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WASHINGTON REPORTS

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IN THE

SUPREME COURT

OF

WASHINGTON

SEPTEMBER 6, 1905—DECEMBER 13, 1905

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ERRATA

**Page 31, line 15 from top: For 456, 39 Pac. 973, read 476, 63
Pac. 520**

Page 580, line 17 from bottom: For ADVERSARY read ADVERSELY

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON.

[No. 5581. Decided September 6, 1905.]

CHARLES J. SLAYTON, *Appellant*, v. D. W. FELT,
Respondent.¹

APPEAL AND ERROR—PRESERVATION OF GROUNDS—FINDINGS—NECESSITY—REQUEST FOR. In an action at law tried by the court without a jury, in order to assign error on the failure of the court to make any findings of fact, the appellant must, after his requested findings have been refused, request the court to make such findings as it may determine to be proper.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 24, 1904, in favor of the defendant, after a trial before the court without a jury, dismissing on the merits an action to recover a broker's commission. Affirmed.

Saulsberry & Stuart, for appellant.

Byers & Byers, for respondent.

CROW, J.—This action was commenced by appellant, Charles J. Slayton, against respondent, D. W. Felt, to recover a broker's commission on the sale of real estate in the city of Seattle. Upon the trial before the court without a jury, appellant presented findings of fact in his favor, which the court declined to make. Judgment was entered dismissing the action. Said judgment contained the fol-

¹Reported in 82 Pac. 173.

lowing recital: "The court, having heard the testimony and the arguments of counsel, and being fully advised, finds the issues in favor of the defendant, and that said action should be dismissed." No findings of fact or conclusions of law were signed by the court, or filed with the clerk. Appellant excepted to the judgment, after its entry, for the reasons: (1) That said judgment was not supported by the evidence; (2) that the court had failed and refused to make findings of fact and conclusions of law, separately stated; (3) that the court had refused to make findings of fact as requested by appellant. A motion for a new trial made on the same grounds being overruled, this appeal has been taken.

(1) It is contended by appellant that the court erred in entering judgment of dismissal for the reason that such judgment was not warranted by the evidence, and was contrary to the law. As we understand it, this contention involves the proposition that, upon the evidence admitted, findings of fact should have been made in appellant's favor. Upon the issues formed by the pleadings, and as ultimately tried by the court, but one question of fact arose. Did appellant find a purchaser for the real estate in question, and was he the efficient cause in procuring and bringing about the sale? Upon this issue, there was a considerable conflict of evidence. The record contains a copy of the findings requested by appellant. The refusal of the court to sign the same clearly shows that, in weighing the evidence, it found against appellant upon this issue. We have carefully examined the evidence, and are unable to find that the court was not warranted in refusing to make the findings requested. Although no affirmative findings of fact were filed, the court must have concluded from all the evidence that appellant was not the efficient and procuring cause in making said sale.

(2) Appellant also contends that the trial court erred in failing to make findings of fact and conclusions of law, separately stated, or at all, and asks that the judgment be

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reversed by reason thereof. Appellant urges that under Bal. Code, § 5029, it was the duty of the trial court to make findings of fact and conclusions of law, separately stated. Respondent contends that, as the final judgment was one of dismissal, findings of fact were unnecessary, citing, *Thorne v. Joy*, 15 Wash. 83, 45 Pac. 642, and *Noyes v. King County*, 18 Wash. 417, 51 Pac. 1052. Both of said cases were actions in equity. This court has heretofore announced the rule that findings of fact and conclusions of law are not necessary in equitable actions, but we are not aware of any such announcement being made as to actions at law. We see no reason why findings of fact and conclusions of law are not just as essential, if properly requested, in an action at law when the same is dismissed, as where an affirmative judgment is entered. This being an action at law, the cases cited by respondent do not sustain his contention. The question then arises whether the action of the trial court in failing to make findings of fact and conclusions of law amounted to such prejudicial error as would entitle appellant to a reversal. In *Wilson v. Aberdeen*, 25 Wash. 614, 66 Pac. 95, this court said:

“We come now to the consideration of the appellants’ contention that the judgment must be reversed because of the failure of the trial court to make findings of fact and conclusions of law. Our statute provides that ‘upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly.’ Bal. Code, § 5029; 2 Hill’s Code, § 379. This provision of the code is in form mandatory, and this court has several times held, in effect, that in actions at law tried by the court without a jury, findings of fact and conclusions of law are necessary to support the judgment. See, *Bard v. Kleebe*, 1 Wash. 370, 25 Pac. 467; *Kilroy v. Mitchell*, 2 Wash. 407, 26 Pac. 865; *King County v. Hill*, 1 Wash. 404, 25 Pac. 451; *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030; *Potwin v. Blasher*, 9 Wash. 460, 37 Pac. 712.

But in more recent cases it has been decided that a judgment will not be reversed on appeal for want of findings of fact and conclusions of law, where it is not made to appear by the record that there was any request for such findings and conclusions, or any objection raised upon that account. *Washington Rock Plaster Co. v. Johnson*, 10 Wash. 445, 39 Pac. 115; *Remington v. Price*, 13 Wash. 76, 42 Pac. 527."

It is true that appellant did request the trial court to make findings of fact in favor of himself, upon the issues raised by the pleadings, the same being claimed by him to be warranted by the evidence admitted. The court, not thinking the evidence warranted such findings, refused to sign the same. It does not appear, however, that appellant at any time requested the court to make such findings of fact and conclusions of law as it might determine to be proper or warranted by the evidence. We think this request should have been made, before appellant would be entitled to base a successful assignment of error upon the refusal of the court to make any findings whatever. The findings requested by appellant are shown in the record, and afford him an opportunity, of which he has availed himself, to assign error upon the refusal of the trial court to make the same. He has been deprived of no legal or valuable right in that direction. This court in *Bard v. Kleebe*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273, construing said Bal. Code, § 5029, there mentioned as § 246, said:

"As we regard it, § 246 is for the protection of court and parties. To the court it gives an opportunity to place upon record its view of the facts and the law in definite written form, sufficiently at large that there may be no mistake. To parties it furnishes the means of having their causes reviewed, in many instances, without great expense."

The only privilege of which the appellant has been deprived, if any, has been to bring an appeal to this court without a statement of facts based upon such findings as the court would have signed if requested, but which, necessarily, would have been against appellant upon the issues

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joined. Such an appeal could not have benefited appellant in any manner whatever. In view of this fact, and, also, the further fact that appellant failed to request the court to make findings in accordance with its view of the evidence, we think no error prejudicial to appellant has been committed. In an action at law, either party has the right to request a trial court to make such findings of fact as it may deem proper, upon all the issues involved, or upon any particular issue, which such party may deem material or important, and such findings should then be made. A mere request, however, to make certain findings in favor of such party only, is not in itself sufficient. Of course, it is the proper and correct practice for a party to request findings in his own favor, to which he may think himself entitled, so that he may make proper exceptions to their refusal. But such findings in his favor having been refused and excepted to, he must, if he desires to assign error on a failure to make any findings or conclusions whatever, also request the court to make such findings as it thinks the evidence warrants. This was not done by appellant in this action.

We find no prejudicial error in the record. The judgment is affirmed.

MOUNT, C. J., ROOT, and HADLEY, JJ., concur.

FULLERTON and DUNBAR, JJ., concur in the result.

RUDKIN, J.—I concur in the result, but do not think that findings are necessary where no affirmative relief is granted.

[No. 5533. Decided September 6, 1905.]

THOMAS J. WRIGHT *et al.*, Respondents, v. R. T. DANIEL,
Appellant.¹

LIBEL AND SLANDER — REFERENCE TO DANCE HALL — WORDS NOT ACTIONABLE PER SE — PLEADING — COMPLAINT — EVIDENCE — SUFFICIENCY. A complaint for libel in having charged the plaintiff with conducting an entertainment in a manner that "would be a disgrace to the Comique or the worst dance hall in the city" is not sufficient in the absence of inducement or explanation as to the character of the places referred to.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered September 16, 1904, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for libel. Reversed.

Samuel R. Stern, and *Robertson, Miller & Rosenhaupt*, for appellant.

Merritt & Merritt, and *B. B. Adams*, for respondents.

Root, J.—Respondents were tenants of appellant, upon the third floor of a building known as the "Daniel Block," in Spokane. They occupied some of the rooms as their dwelling place, and let others to lodgers. About 10:30 p. m., December 7, 1903, one Rose, a commercial traveler, while in a grill room in Spokane, met a man named Rickard, accompanied by two women, one of whom he introduced as his wife and the other as a friend of hers. After drinking awhile, these four persons started for the apartments of respondent Mrs. Wright, Rose having been there before. On their way, they fell in with a railway brakeman, and took him along. They also took along several bottles of beer. Arriving at Mrs. Wright's rooms, they proceeded to have some music. After their arrival, other parties also came in. To heighten the entertainment, some of the parties

¹Reported in 82 Pac. 139.

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went over to a variety theatre, and brought back two musical performers (a man and woman) and a female impersonator. The company now consisted of about a dozen persons. Music upon various instruments was furnished, and vocal efforts in many keys. Beer and whisky were summoned from a near-by saloon in copious quantities. They danced the waltz, two-step, jigs, cake-walk, and otherwise amused themselves, while the impersonator gave a variety of performances.

There is some conflict in the evidence as to the amount of noise accompanying this entertainment, the respondents claiming that it was very orderly and comparatively quiet, while appellant's witnesses describe it as exceedingly boisterous. Anyway, sometime after midnight, other tenants in the building complained vigorously to the landlord, this appellant, about the noise in Mrs. Wright's apartments, and finally appellant told respondents that the disturbance must cease or he would call in the police. Respondents fix the hour as 1:00 a. m. Other evidence places it at about 2:00 a. m. Mrs. Wright admitted that it had been customary to have liquor sent to the rooms theretofore. It appeared that complaint had been made to appellant about disturbances of this kind in respondents' rooms theretofore. On the next day after the events above set forth, appellant left in respondents' room a letter, of which the following is a copy:

"Spokane, Wash., Dec. 8, 1903.

"Mrs. T. J. Wright, Third Floor, Daniel Block, City: Dear Madam—You are notified by Mr. Daniel that the different tenants in the block have made complaints that you are making it very unpleasant and almost unbearable for them.

"Complaint No. 1, which has been made to him several times by Mrs. Starkey and Mrs. Rudersdorf and other tenants; that complaint has led up to the closing up of the archway and cutting you off from the Howard street stairway, unless all dogs are removed from the premises immediately, yours not excepted.

"Complaint No. 2—For disturbing the sleepers at deadly hours of the night on the Howard street stairway and in your private rooms. You should have some respect for others. Dr. and Mrs. Starkey's room is under your private room, and is entitled to respect and consideration. Last night you held a war dance and carried on at a rate that would be a disgrace to the Comique or the worst dance hall in the city. This performance I witnessed myself at two o'clock this morning. Kicks are constantly coming in about your splitting wood on the floor. Now, in view of the fact that I have favored you in every way to help you, leaving your rent at three-fifths what it should be, makes me feel that you are very undeserving at the least, and I simply have this to say, if you do not remove every dog from the block in twenty-four hours I will raise your rent to \$125.00 per month, and should further complaints continue to come in, my agents are instructed to begin legal proceedings to remove you from the premises. I positively will not have all the block upset for the petty sum you are paying.

"Yours truly, R. T. Daniel, Owner."

Appellant also showed this letter to one Rudersdorf, a tenant who had complained of the disturbances aforesaid and of the dogs maintained in the building.

Respondents brought this action as for libel. The trial resulted in a verdict for \$1,500. The trial judge reduced the amount to \$750, for which amount judgment was rendered. Appeal is taken from this judgment.

A showing is made here that, since the entry of said judgment, respondents have been separated by divorce; and a motion to abate the action is made on account thereof. In view of the conclusion we have reached upon the merits, we do not pass upon this motion. The case was tried upon the second amended complaint. The portion of the letter relied upon as libelous is that where reference is made to "the Comique or the worst dance hall in the city." There is nothing in said second amended complaint in the nature of inducement, colloquium, or innuendo. The court is not informed as to the character or reputation of the "Comique,"

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nor as to how bad the dance halls are in Spokane, or as to whether there are any.

Owing to the character of the facts revealed by the evidence in this case, we do not conceive that a discussion of them would be edifying or essential. In view of the form of the complaint, and considering merely the evidence adduced on the part of respondents and that on appellant's behalf which was uncontradicted, we are led to believe that the ends of justice will be subserved by a dismissal of this action.

The judgment of the honorable superior court is reversed, with directions to dismiss the action.

MOUNT, C. J., CROW, RUDKIN, HADLEY, and DUNBAR, JJ., concur.

[No. 5467. Decided September 6, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK
RUTLEDGE, *Appellant*.¹

COSTS — ON REVERSAL IN CRIMINAL CASE — TAXATION AGAINST STATE — STATUTES — CONSTRUCTION — LONG ACQUIESCENCE IN PRACTICE. Under Bal. Code, §§ 1627, 5182, 6528, and 7009, the costs on appeal in a criminal case, where the appellant is successful, are taxable against the state, especially in view of the uniform construction that has been placed thereon for years, and acquiesced in by the legislature.

Exceptions on the part of the state to the taxation of costs against it upon the reversal in the supreme court of a judgment of conviction in a criminal action. Exceptions overruled.

Robertson, Miller & Rosenhaupt, for appellant.

Horace Kimball, R. M. Barnhart, and A. J. Falknor, for respondent.

¹Reported in 82 Pac. 126.

PER CURIAM.—The appellant was convicted of crime, and appealed to this court, when the judgment entered against him was reversed. In perfecting his appeal, he paid the following fees and costs: To clerk supreme court, docket fee, \$5.00; to clerk superior court, transcript, \$5.00; to clerk superior court, certificate, \$.25; to printing brief, \$24.75; to stenographer, transcribing statement of facts, \$60.90. On the entry of the judgment of reversal in this court, the clerk allowed the appellant judgment for the amount so paid, taxing the same against the state. The state excepted to the allowance of any costs whatsoever against it, and contends here that there is no warrant or authority of law for taxing against it the costs advanced by an appellant, on an appeal in a criminal action or proceeding, whether the appeal be prosecuted successfully or otherwise.

It may be conceded that the state, in the absence of a statute so providing, is never liable for costs in a criminal action, whether the defendant be acquitted or convicted. The question presented therefore is, is there a statute in this state allowing costs to an appellant on an appeal in a criminal case where the appeal is successful? Those called to our attention as bearing upon the question are the following from Bal. Code:

“§ 1627. When any person shall be brought before a court, justice of the peace, or other committing magistrate of any county, city, or town in this state, having jurisdiction of the alleged offense, charged with the commission of a crime or misdemeanor, and such complaint upon examination shall appear to be unfounded, no costs shall be payable by such acquitted party, but the same shall be chargeable to the county, city, or town for or in which the said complaint is triable;”

“§ 5182. In all actions prosecuted in the name and for the use of the state, or in the name and for the use of any county, the state or county shall be liable for costs in the same case and to the same extent as private parties.”

“§ 6528. Costs shall be allowed in the supreme court, irrespective of any costs taxed in the case in the court below,

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to the prevailing party in the supreme court, on any appeal in any civil action or proceeding as follows: The fees of the clerk of the supreme court paid by the prevailing party, the fees of the clerk of the court below for preparing, certifying and sending up the records on appeal, or any supplementary record, paid by the prevailing party, and twenty-five dollars attorneys' fees, besides his necessary disbursements for the printing of briefs, and any sum actually paid or incurred by the prevailing party as stenographer's fees, not exceeding ten cents a folio, for making a transcript of the evidence or any part thereof included in the bill of exceptions or statement of facts; but when the judgment of the court below shall be affirmed in part and reversed in part, or affirmed as to some of the parties and reversed as to others, or modified, the costs shall be in the discretion of the court, and when the judgment is reversed and a new trial ordered, the court may in its discretion direct that costs of the prevailing party shall abide the result of the action. When in the opinion of the supreme court a brief of the prevailing party shall be unnecessarily long, or improper in substance, the court may in its discretion order the disallowance as costs of any part or the whole of the disbursements for printing the same."

"§ 7009. No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment is found against him, or for want of prosecution, shall be liable for any costs or fees of any officer, or for any charge of subsistence while he was in custody, but in every such case the fees of the defendant's witnesses, and of the officers for services rendered at the request of the defendant, and charges for subsistence of the defendant while in custody, shall be taxed and paid as other costs and charges in such cases."

Also, the fee bill of 1903, which requires all appellants, in criminal as well as in civil cases (excepting only the state, a municipal corporation, or a public officer prosecuting or defending on behalf of such state or municipal corporation), to advance certain fees in order to perfect an appeal.

While these statutes are not so clear upon the question in dispute as we would have been glad to have found them, yet

we think they reasonably tend to support the claim that costs and disbursements expended in perfecting an appeal in a criminal action, where the appellant is successful, are taxable against the state. Moreover, nearly all of the sections cited have been upon the statute books since early statehood, and the uniform construction put upon them by the clerks of this court has been to the effect that they authorized the taxation of costs against the state where a defendant in a criminal action on an appeal procured a reversal of a judgment entered against him. This uniform and long continued construction by these officers, while not sufficient to overturn positive law to the contrary, ought to have great weight on a doubtful statute, and especially so, where the legislature, which alone has power to say whether such costs shall or shall not be taxed, has long acquiesced in that construction.

We conclude the costs were properly taxed, and the cost bill excepted to will stand approved.

[No. 5608. Decided September 6, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. OTTO
BRINGGOLD, *Appellant*.¹

APPEAL—REVIEW—QUASHING WRIT OF CERTIORARI NOT REVIEWED ON SUBSEQUENT APPEAL FROM THE JUDGMENT. Error in refusing to quash a writ of certiorari from a justice's court, appeal from which was taken but not perfected, cannot be reviewed on a subsequent appeal from a conviction thereafter had in the superior court.

CRIMINAL LAW—APPEAL FROM JUSTICE'S COURT—TRIAL DE NOVO AFTER SUSTAINING DEMURRER TO COMPLAINT IN JUSTICE'S COURT. Upon appeal from a justice's court in a criminal case, the superior court has jurisdiction of the cause for trial *de novo*, and after sustaining a demurrer to the complaint below, may direct a new complaint or information to be filed.

¹Reported in 82 Pac. 132.

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Syllabus.

CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWAL—EVIDENCE AS ADMISSION OF DEFENDANT. A plea of guilty in a justice's court that has been withdrawn is competent evidence as an admission upon the trial of the cause *de novo* in the superior court.

CRIMINAL LAW—EVIDENCE OF JUSTICE OF PEACE BEFORE WHOM DEFENDANT WAS TRIED—ADMISSIBILITY. A justice of the peace is a competent witness concerning the facts that occurred before him on a previous trial of the case.

CRIMINAL LAW—TAMPERING WITH WITNESSES—EVIDENCE OF DEFENDANT'S KNOWLEDGE OF PENDENCY OF SUIT. Upon a prosecution for tampering with a witness in a certain cause, the record in such cause is admissible where there was other evidence that the defendant knew that such cause was in progress at the time in question.

SAME—RECORD OF FORMER CASE—IDENTIFICATION OF COMPLAINT—WHEN ADMISSIBLE WITHOUT AUTHENTICATION. Upon a prosecution for tampering with a witness in a certain cause, a complaint, to which the defendant had pleaded guilty at a former trial, is admissible in evidence without authentication, when there is evidence that it had been read over to the accused at the former trial and was identified as the same complaint to which he had pleaded guilty.

SAME—WITNESS TAMPERED WITH NOT SUBPOENAED. Upon a prosecution for tampering with a witness, it is immaterial whether or not the witness had been subpoenaed.

EVIDENCE—LETTERS FROM THIRD PERSON—INADMISSIBLE AS EVIDENCE OF FACTS STATED. Upon a prosecution for tampering with a witness, letters from her to the accused are inadmissible as original evidence of the facts recited in them.

APPEAL—REVIEW—IMMATERIAL EVIDENCE. Error cannot be predicated on the rejection of immaterial evidence having no bearing on the case.

SAME—INSTRUCTIONS—EXCEPTIONS. Error cannot be predicated upon instructions not excepted to within the time prescribed by statute.

CRIMINAL LAW—TAMPERING WITH WITNESS—PERSUASION—THREATS—EVIDENCE—SUFFICIENCY. Upon a prosecution for tampering with a witness, the evidence is sufficient to sustain a conviction, where it appears that the accused, for the purpose of obstructing the course of justice, endeavored to persuade the witness not to testify, and resorted to threats to blacken her good name if she did so; and in such case the evidence does not warrant the giving of an instruction to acquit if the jury find that accused advised the witness to do her duty and tell the truth.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered March 3, 1904, upon a trial and conviction of the offense of tampering with a witness. Affirmed.

Peacock & Wells and *E. H. Sullivan*, for appellant.

R. M. Barnhart and *A. J. Laughon*, for respondent.

FULLERTON, J.—On December 18, 1903, a complaint was filed in the justice's court of Spokane precinct, before J. D. Hinkle, justice of the peace, charging the appellant with the offense of tampering with a witness. A warrant of arrest was issued on the complaint, and the appellant was arrested thereon, and brought before the justice, when the offense with which he was charged was made known to him. Being called upon to plead to the charge, the appellant entered a plea of guilty, whereupon the justice continued the case until the next day, for the purpose of examining witnesses as to the circumstances under which the offense was committed. On the next day, at the time appointed, the appellant appeared with counsel, and moved the court for leave to withdraw his plea of guilty, stating that the same was entered by mistake, and that he desired a trial upon the merits of the accusation against him. The justice refused to permit the appellant to withdraw his plea, and thereupon examined a witness as to the circumstances of the offense, at the conclusion of which he adjudged the appellant guilty, on his plea of guilty, and sentenced him to jail for ten days, and to pay a fine of \$70 and costs.

The appellant, in open court, gave notice of appeal to the superior court, and requested the justice to fix the amount of bail he would require to supersede the judgment pending such appeal. The justice refused to fix the bail, giving as his reason therefor that an appeal did not lie from a judgment of conviction had on a plea of guilty. The appellant thereupon applied for and obtained a writ of review

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from the superior court of Spokane county, commanding the justice to make return of a transcript of the record and proceedings to that court, that the same might be reviewed as by law provided.

On this return being made, the appellant moved the court to require the justice to make a more complete return, averring by affidavit that the return made was incomplete and false. The state at the same time moved to quash the writ. These motions came on for hearing together, when the court denied the appellant's motion, but granted that of the state, holding that the remedy of the appellant for any error committed by the justice of the peace was by appeal. The appellant gave notice of appeal to the supreme court from these orders, and the court at his request fixed the amount of the bond required to be given in order to perfect the appeal; the appeal, however, seems never to have been perfected.

While these proceedings were being had, the justice of the peace transmitted to the superior court a transcript of the record on the appeal from the judgment of conviction entered in his court, and, on the return day fixed by him, the appellant appeared and asked leave to withdraw his plea of guilty to the complaint, and plead anew thereto in the superior court. This motion the court granted, whereupon the appellant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a crime; which demurrer the court sustained, holding the defendant to appear on a future day certain to abide the order of the court. The state thereupon asked leave to file an information against the defendant, charging him with the same offense. On leave being granted, an information was filed, to which the appellant pleaded not guilty, and a trial was had thereon before a jury, resulting in a judgment of conviction. This appeal is from that judgment.

The first three errors assigned refer to the orders of the court leading up to the filing of the information. It is con-

tended that the court erred in overruling the appellant's motion for a further and more complete return to the writ of review; in quashing the writ of review, and in not sending the case back to the justice of the peace with instructions to allow the appellant to withdraw his plea of guilty entered to the complaint; and in not sending the case back with instructions to grant the appellant's appeal therefrom. But these are questions not presented by the record before us. Had appellant perfected his appeal from the order quashing the writ of review, this court would probably have reviewed them on that appeal, but it cannot review them on the present appeal. A writ of review, under our practice, is an independent proceeding, in which a final judgment can be entered, and from which an independent appeal may be taken. The writ, while it may be sued out in aid of other proceedings, never becomes so far a part of such other proceedings that it may be reviewed on an appeal taken from a judgment entered therein. So, whether or not there was error in quashing the writ and refusing to make the several orders demanded, we have no power to inquire on this appeal.

It is next assigned that the court erred in assuming jurisdiction over the offense, after having sustained a demurrer to the complaint brought up from the justice's court. It is said that the superior court's jurisdiction was appellate only, and when it was determined that the justice's judgment was erroneous because entered on an insufficient complaint, the superior court was without authority to proceed further with the case, and should have dismissed it or remanded it to the justice's court for further proceedings. Such, however, is not the rule. An appeal of a criminal case, from a justice of the peace to the superior court, vests the superior court with jurisdiction to proceed in the case as if it had been originally commenced in that court. It tries the case *de novo*, and pronounces such judgment as it deems the case warrants. If it finds that the complaint filed in the justice's court fails to state facts sufficient to constitute a crime, it

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has jurisdiction either to discharge the defendant, allow the complaint to be amended by the filing of a new complaint, or direct that an information be filed against him charging him with that offense which it appears to the court he has committed. In either event the cause proceeds as if originally commenced in the superior court. Here, the superior court directed an information to be filed, and in so doing acted within its jurisdiction.

It is next assigned that the court erred in permitting the state to show that the appellant had pleaded guilty to the complaint filed against him in the justice's court. It is argued that this plea became *functus officio* after it was withdrawn, and was no longer admissible as evidence. There are cases which maintain this rule, but we think the better rule is the other way. It is generally held that extrajudicial confessions, voluntarily made by a defendant, are admissible against him as evidence tending to show the fact confessed, whether or not the confession itself, or the matter of the confession, be afterwards denied. The withdrawal of a plea of guilty, and the entry of a plea of not guilty, is in effect only a denial of facts that were at one time admitted, and it would seem that any rule that would admit in evidence a confession made out of court, ought to admit one made in court. Such a plea is not, of course, conclusive evidence against the defendant. It is competent evidence merely, its weight and sufficiency being for the jury. *Terry v. State*, 39 Tex. Cr. Rep. 628, 47 S. W. 654; *Commonwealth v. Brown*, 150 Mass. 330, 23 N. E. 49; *Murmutt v. State* (Tex. Cr. App.), 67 S. W. 508; *People v. Gould*, 70 Mich. 240, 38 N. W. 232, 14 Am. St. 493; 12 Cyc. 460.

In this connection it is further urged that the justice of the peace was incompetent to testify concerning what occurred when the appellant was brought before him, under the rule announced by this court in *Maitland v. Zanga*, 14 Wash. 92, 44 Pac. 117. In that case we held it error

for the judge presiding at the trial of a case to testify therein, over the objection of the party against whom he was called as a witness. But that case is not authority for the question here. In the case before us, the judge was not called to testify in a case over which he was presiding as judge, but was called to testify concerning a fact occurring in a previous trial over which he presided as judge. No court, so far as we are advised, maintains the doctrine that a witness under the circumstances shown here is not competent to testify.

The witness the appellant was accused of tampering with was the prosecuting witness in the case of *State v. Royce*. (38 Wash. 111, 80 Pac. 268). At the trial, the state offered the record of that case in evidence, and it was admitted over the appellant's objection. The appellant now urges that this was error, because the state had not "made it relevant by proof of knowledge on the part of the appellant of said cause being in progress in the superior court." But the appellant mistakes the record. There is abundant proof in the record that the appellant knew that the cause of *State v. Royce*, was pending when he endeavored to prevent the prosecuting witness from appearing and giving evidence in that cause.

One J. F. McDermott was called as a witness on behalf of the state, and testified to certain confessions and admissions made by the appellant tending to show guilt. Among other things, he testified that, when the appellant was brought before the justice of the peace, a complaint charging him with tampering with a witness in the case of *State v. Royce*, was read to him, and that he pleaded guilty to the charge, and that shortly thereafter he remarked to the witness, "Now, Mac, I pleaded guilty, and I want you to not bring any more witnesses than is necessary; there is no use in knocking me any harder than you have to." In connection with this evidence, the state offered, and the court admitted, the complaint in evidence, after it had been shown the witness

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and identified by him as the one read to the appellant. It is urged that this was error because the complaint was a public record, and to be admissible must be produced by its proper custodian, and it was not shown that any reason existed for introducing it in this irregular manner. Conceding that the complaint referred to was a public record, it would be no reason for denying its admission as evidence to show that it had been improperly obtained from the public records. Nor was its admission otherwise objectionable. The complaint was offered as explanatory of the witness' testimony, and as such was admissible whether it was a public record or not, on the same principle that plats, diagrams, photographs, pictures, and other articles are admissible, when they tend to illustrate, explain, and make more clear to the understanding the facts testified to by a witness. This complaint, after being identified by the witness as being the one read to the appellant, and the one containing the charges to which he pleaded guilty, was admissible for the purpose of informing the jury what those charges were. The identification made by the witness was sufficient to authorize its introduction as evidence for that purpose; formal certification by its proper custodian is necessary only in cases where a record is attempted to be proved as a record.

The offense charged in the information against the appellant was that he did, on the 16th day of December, 1903, wilfully and corruptly endeavor to prevent and hinder Mrs. D. C. McFarlane from appearing as a witness in and before the superior court, and from giving evidence and testimony in a case therein pending, wherein the state of Washington was plaintiff, and William A. Royce was defendant. On the trial, the appellant offered in evidence a subpoena, showing that Mrs. McFarlane was served on December 18, 1903, to appear as a witness in that cause, which offer the court rejected. The appellant assigns this as error, contending that the person tampered with must be subpoenaed as a

witness before the statutory offense of tampering with a witness can be committed. But the phrase "tampering with a witness" is only the statutory name for the offense described in the body of the act defining the offense. The act provides that,

"If any person shall wilfully and corruptly . . . endeavor to hinder, or prevent any person from appearing . . . as a witness, or from giving evidence in any action or proceeding, with intent thereby to obstruct the course of justice, he shall be deemed guilty," etc. Laws 1901, p. 16.

The offense is committed by endeavoring to prevent any person, whether subpoenaed as a witness or not, from appearing and giving evidence. Hence, it could make no difference in this case, so far as the appellant's guilt was concerned, whether or not Mrs. McFarlane was subpoenaed as a witness in the case of *State v. Royce*, at the time the appellant committed the offense charged against him. He was guilty of the offense described in the statute, if he wilfully and corruptly endeavored to prevent her from appearing as a witness in that case, or from giving evidence therein, with intent to obstruct the course of justice. The fact that she may not then have been subpoenaed is immaterial, and it was not error to refuse to admit in evidence the subpoena offered.

When Pearl McFarlane was on the stand for the state, certain letters were shown her which she admitted having written to Royce. The appellant subsequently offered these letters in evidence, as a part of his defense, and argues here that it was error for the trial court to reject them. But clearly they were inadmissible. If the witness had testified to material matters on behalf of the state which these letters would contradict, they would, perhaps, have been admissible as evidence tending to impeach her, but they could not be original evidence of the facts recited in them.

There was no error in refusing to permit the clerk to testify to the disposition that was made of the complaint

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filed in the justice's court, after the case had been brought to the superior court on appeal, nor in rejecting the certified transcript of the proceedings had before the justice of the peace. These related to immaterial matters, having nothing to do with any fact upon which the jury were required to pass.

The instructions complained of were not excepted to within the time prescribed by statute, and any error contained in them was waived by the failure to so except.

At the conclusion of the evidence, the appellant requested the court to instruct the jury to return a verdict of not guilty. On this request being refused, he requested that the court give the following instruction:

"(2) If you find from the evidence that the defendant said to Mrs. D. C. McFarlane that she should go to the prosecuting attorney and tell him the facts and leave the matter to him and if the prosecutor said that she should go on the stand as a witness against said William A. Royce, then she should do her duty and tell the truth, you should find the defendant not guilty."

Each of these instructions were properly refused. The first is based on the contention that the evidence was insufficient to justify a verdict of guilty. The appellant argues that the act of trying to persuade a person not to testify in a given case does not constitute the offense defined by the statute, but that some physical act of intervention on the part of a defendant is necessary to constitute the offense, and that here nothing more than mere persuasion was shown. But we think the appellant is wrong in both his statement of the rule and his deduction from the evidence. If the endeavor to prevent the person from appearing as a witness and giving evidence is done with intent to obstruct the course of justice, it matters little what form the endeavor takes. It may be by persuasion, advice, threats, or physical acts of intervention—either constitutes the crime. So if it were true that the appellant merely tried to persuade this

witness not to appear, the evidence would be sufficient to warrant his conviction, as it appears clearly that the effort was made for the purpose of obstructing the course of justice. But the appellant was guilty of something more than mere persuasion. True, he did not resort to physical force, but he made threats of the most dastardly sort, threats to blacken the witness' good name if she appeared and testified in the action against Royce. It is just such cases as this that the statute was intended to punish, and on the facts of the case, we have no hesitancy in saying that the verdict was just and proper.

It was not error to refuse to give the second requested instruction. If such an instruction could be proper in any case, it is sufficient to say that the facts of the case before us did not warrant it.

As we find no substantial error in the record, the judgment will stand affirmed.

MOUNT, C. J., RUDKIN, ROOT, CROW, HADLEY, and DUNBAR, JJ., concur.

[No. 5560. Decided September 6, 1905.]

JOHN JOHNSON *et al.*, Appellants, v. H. O. SHUEY,
*Respondent.*¹

FRAUD—FALSE REPRESENTATIONS OF PRIVATE BANKER TO SECURE CREDIT — LIABILITY TO DEPOSITORS — PLEADING — COMPLAINT — SUFFICIENCY OF ALLEGATIONS OF FRAUD. In an action to recover of a private banker the amount of deposits fraudulently secured by the defendant, the complaint states a good cause of action for fraud, where it is alleged that he opened the bank without capital, fraudulently misrepresenting the same, and falsely representing that the bank was incorporated, thereby securing the deposits, and made a pretended sale of the bank to an incompetent person whose mismanagement resulted in the loss of the deposits.

BANKS AND BANKING — LIABILITY OF PRIVATE BANKER TO DEPOSITORS—COMPLAINT—SUFFICIENCY—DEFENSES—TRANSFER OF INTEREST IN BANK. A private banker is personally liable to repay de-

¹Reported in 82 Pac. 123.

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Citations of Counsel.

positors, on demand, the amount of their deposits at the time of his transfer of the bank, or the amount they might thereafter deposit in ignorance of the transfer, if without negligence in failing to discover the transfer, and this right of action is assignable.

SAME—DEFENSES—PRESENTATION OF CLAIMS TO RECEIVER AND ACCEPTANCE OF DIVIDENDS—ORIGINAL DEBTOR NOT DISCHARGED BY UNSUCCESSFUL EFFORTS TO RECOVER. A depositor's right of action against a private banker is not discharged by the filing of a claim and acceptance of a dividend from a receiver of the banker's assignee to whom the bank had been sold, and who had agreed to repay the deposits; since the promise to pay the deposits may be sued on by the depositors in their own names, and merely makes the original debtor a surety, and both debtors may be pursued, severally or jointly.

ELECTION OF REMEDIES—JOINT DEBTORS. Where two are severally liable to pay the same debt, an attempt to collect from one is not such an election of remedies as to bar an action against the other upon failing to collect the whole debt in the first action.

RECEIVERS — JUDGMENT IN RECEIVERSHIP ACTION WHEN NOT RES JUDICATA AS TO SEVERAL LIABILITY OF ONE CREDITOR TO OTHER CREDITORS. An order for distribution in a receivership to the effect that the insolvent was indebted to a certain creditor, and fixing his *pro rata* share, is not *res judicata* of the several liability of such creditor to the other creditors, where he stood in the position of surety for the insolvent, when that issue was not raised in the pleadings or tried, and the other creditors did not seek to have his *pro rata* share paid over to them.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 14, 1905, in favor of the defendant, on motion for judgment on the pleadings, in an action founded on deceit. Reversed.

Walter S. Fulton, for appellants. There was no election of remedies. 7 Ency. Plead. & Prac., p. 363 and note; *Powers v. Benedict*, 88 N. Y. 605; *Singer v. Schilling*, 74 Wis. 369, 43 N. W. 101; *Lee v. Burnham*, 82 Wis. 209, 52 N. W. 255; *Walden Nat. Bank. v. Birch*, 130 N. Y. 221, 29 N. E. 127, 14 L. R. A. 211; *Union Cent. Life Ins. Co. v. Schidler*, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89; *Laurence v. Security Co.*, 56 Conn. 423, 15 Atl. 406, 1 L. R. A. 342.

H. R. Clise and *John B. Hart*, for respondent, contended, among other things, that the presentation of claims in the receivership and acceptance of the dividends constituted an election of remedies. 7 Ency. Plead. & Prac., 361; *Moller v. Tuska*, 87 N. Y. 166; *Nanson v. Jacob*, 93 Mo. 331, 6 S. W. 246, 3 Am. St. 531; *Gaffney v. Megrath*, 23 Wash. 476, 63 Pac. 520; *McWilliams v. Thomas* (Tex.), 74 S. W. 596; *Robb v. Voss*, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 21 N. E. 172, 10 Am. St. 479, 4 L. R. A. 145; *Hansen's Empire Fur Factory v. Teabout*, 104 Iowa 360, 73 N. W. 875; *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. 803, 8 L. R. A. 216; *Standard Oil Co. v. Hawkins*, 74 Fed. 395, 33 L. R. A. 739; *Moline Plow Co. v. Rodgers*, 53 Kan. 743, 37 Pac. 111, 42 Am. St. 317; *National Bank v. First Nat. Bank*, 57 Kan. 115, 45 Pac. 79; *McLean v. Ficke*, 94 Iowa 283, 62 N. W. 753; *Mercantile Realty Co. v. Stetson*, 120 Iowa 324, 94 N. W. 859; *Bauman v. Jaffray*, 86 Tex. 617, 26 S. W. 394; *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238.

FULLERTON, J.—This is an appeal from a judgment rendered on the pleadings. The appellants, as assignees of the depositors of the Bank of Ballard, commenced this action to recover from the respondent the difference between the amounts the depositors had to their credit at the time of the failure of the bank, and the amounts thereafter paid them by the receiver of the bank's assets. The appellants are the holders of some one hundred and sixty-five different claims, and their complaint contains that number of separate causes of action.

The substance of each cause of action is that, at the time the depositors who assigned their claims to the appellants opened accounts with the Bank of Ballard, the bank was owned and conducted by the respondent, H. O. Shuey, individually, and that he fraudulently, and for the

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purpose of inducing the assignors of the appellants to open accounts with him, represented to them, and the public generally, that the bank was incorporated, and that the amount invested in it as capital thereof was \$25,000; whereas, in truth and in fact, the bank was not incorporated, and no sum in excess of \$3,500 was invested in the business thereof. It is further alleged that the respondent, after receiving sums of money from the several assignors of appellants, afterwards, and without notice to such depositors, attempted to sell all his interests in the bank and its business to one W. W. DeLong, for the sum of \$12,000; that the said DeLong was inexperienced in the banking business; that he had no means with which to purchase the bank, and was financially irresponsible and without money or means with which to carry on such banking business; all of which was well known to the respondent, who, notwithstanding his knowledge, fraudulently, secretly, and for the purpose of escaping liability to said depositors, attempted to constitute DeLong the owner and operator of said banking business, and allowed DeLong to handle the funds of the bank as he saw fit; that, in part payment of the purchase price agreed upon at such pretended sale, the respondent directed and caused DeLong to take out of the funds belonging to the depositors, and pay him, \$7,500, which money he received on account of the purchase price at the pretended sale; and that the respondent thereupon, without the knowledge or consent of the depositors, withdrew from the bank his credit, personal attention, and control, and thereafter refused it financial aid, credit, or assistance; that, as a result of those acts, the bank became insolvent, and on the 30th of January, 1905, closed its doors and suspended payments; that thereafter a receiver was appointed for it, its affairs wound up, and a certain per cent only of the amount the several depositors had on deposit at that time were repaid them; and judgment against respondent is demanded for the amount remaining unpaid.

The respondent interposed a demurrer to the complaint, which the trial court overruled, whereupon he answered, admitting that he owned the bank previous to the 12th day of March, 1902, and averring that on that day he sold the same, together with the good will of the business, certain real estate, and fixtures, to W. W. DeLong, for \$12,000, and that DeLong went into possession of the property, and from thereafter had sole charge of it. He also admitted that the bank became insolvent and closed its doors on January 30, 1903; that a receiver was appointed to wind up its affairs, and did so wind them up, paying the several depositors the sums credited to the several causes of action set out in appellants' complaint. All other allegations of the complaint were denied.

Two affirmative defenses were interposed. In the first, it is alleged that the respondent sold the bank on the 12th day of March, 1902, to W. W. DeLong, giving him a deed of the real estate and a bill of sale of the personal property, which were at that time duly recorded in the auditor's office of the county of King, the county in which the bank was situated; that DeLong immediately entered into the possession of such property, and continued in such possession until January 31, 1903, when a receiver was appointed for the bank at the suit of a depositor; that thereafter the receiver gave notice to all persons having claims against W. W. DeLong and the Bank of Ballard to present them, duly verified; that all the persons named in the several causes of action set out in the appellants' complaint presented to the receiver their written claims for the amount which they had on deposit, which amounts included the sums sued for in this action, each claim being duly verified by its claimants, and collected all of the assets of the bank, and paid to each person named in the complaint his due proportionate part thereof.

The second affirmative defense, after repeating the matter contained in the first affirmative defense, alleged that the

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respondent was a creditor of DeLong and the Bank of Ballard, and held as security certain property; that a question arose between the respondent and the receiver as to a settlement of these matters, whereupon the questions were submitted to the court, and the receiver was directed to pay the respondent \$3,892.77, on condition that the respondent convey to him the property held as such security, and that, when this was done, "the same shall be a final and complete determination of all matters between said receiver and the said Shuey." This order, it is alleged, is a complete and final bar and adjudication of the right of the depositors to assert a liability against the respondent.

In reply, the appellants admitted that duly verified claims were presented to the receiver of the bank of Ballard, for the claims sued upon, and that the receivership case had been wound up and settled. They also admitted that the settlement between the receiver and the respondent took place as alleged, but denied the legal effect imputed to it, or that they, or any of their assignors, were parties thereto, or had knowledge thereof. The other allegations contained in the affirmative defenses were also denied.

On the filing of the reply, a motion for judgment on the pleadings was interposed by the respondent and sustained by the court, on the ground that the assignors of the appellants had, by presenting their claims to the receiver of the property of DeLong, and receiving dividends thereon from the receiver, elected to make DeLong their debtor for the amount of their deposits in the Bank of Ballard, and were now estopped from asserting an indebtedness against the respondent for any part of such deposits.

In this court, to sustain the judgment entered by the court below, the respondent makes three principal contentions: First, that the complaint does not state facts sufficient to constitute a cause of action; second, the contention upon which the trial court based its decision; third, that the rights of all the parties were adjudicated in the order of the court

confirming the settlement made between the respondent and the receiver; and as these contentions present all of the questions involved, we will consider them in their order.

That the complaint states a cause of action cannot be seriously questioned. Briefly restated, it is alleged in the complaint that the respondent opened the bank without capital, falsely and fraudulently pretending that it was incorporated with a capital stock of \$25,000 for the purpose of inducing the assignors of the appellants to make deposits therein; that, by such means, he did induce them to make deposits therein, from time to time, under the belief that the bank was incorporated, and that the respondent was the owner and in charge of the same; that he made a pretended sale of the bank for the purpose of cheating and defrauding his depositors, put an incompetent person in charge of the same without notice to such depositors, who so mismanaged as to cause the loss of the greater part thereof, the amount being stated. Clearly, if the appellants can prove these allegations, they are entitled to recover.

But if we were to adopt the respondent's view and disregard the allegations of fraud, and assume that the several transactions were in fact what on their face they purported to be, the complaint would still state a cause of action. When the respondent opened the Bank of Ballard, as a private banker, and received deposits therein, he assumed a personal obligation to repay to each depositor, or to his order, on demand, the amount deposited by such depositor, either in one single amount, or in such fractional amounts as the depositor should direct. This personal obligation the respondent could not relieve himself of by merely transferring the bank and its deposits to a third person. So that, if it be true that the respondent did make a *bona fide* sale of the bank, and transfer it to DeLong, together with the deposits, he was still personally obligated to repay to each depositor the amount such depositor had therein at the time of the transfer, or might thereafter deposit in igno-

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rance of such transfer and under the belief that the bank was still owned and operated by the respondent; unless, of course, the failure to discover the transfer was the negligence of the depositor. This personal obligation gave each depositor a right of action against the respondent, when demand for the amount deposited was made and payment thereof refused, and this right of action the depositors could assign to the appellants. Unless, therefore, some other element, shown on the face of the complaint, has intervened which cut off this right of action, the complaint states a cause of action, even if we disregard the allegations of fraud.

It is said that this right is cut off by the fact, shown on the face of the complaint, that the appellants' assignors presented the claims sued upon in this action to the receiver appointed over the property of the respondent's assignee, as creditors of such assignee, and received a *pro rata* share of such property as dividends, upon the winding up of the receivership. But clearly this fact alone does not bar the right to recover the balance from the respondent, if he is otherwise obligated to pay it. Two or more persons may be obligated to pay the same debt, and, where such is the case, the pursuit of one debtor does not relieve the others; unless, of course, the debt is collected from the debtor pursued, which the complaint makes clear is not the fact in the case before us. The same result follows if we assume that DeLong, at the time he purchased the bank's property and took over to himself the deposits, promised and agreed to pay, as a consideration for such transfer, the debts due the depositors, and assume, further, that the presentation of these claims to the receiver for payment was in effect a suit by the depositors against the assignee for the amount of such deposits. This court has held that where one person, for a valuable consideration, makes a promise to another to pay the debt of that other to a third person, such third person can maintain an action

in his own name upon the promise. *Norby v. Winsor*, 24 Wash. 535, 64 Pac. 726; *Dimmick v. Collins*, 24 Wash. 78, 63 Pac. 1101; *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934; *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. 892; *Don Yook v. Washington Mill Co.*, 16 Wash. 459, 47 Pac. 964; *Solicitors' Loan & Trust Co. v. Robins*, 14 Wash. 507, 45 Pac. 39; *Silsby v. Frost*, 3 Wash. Ter. 388, 17 Pac. 887. And such, also, is the general rule. 9 Cyc. 378, note 7.

Such a promise does not, of itself, discharge the original debtor, nor does it have that effect when the creditor seeks to collect his debt from the new promisor. The effect of such a promise is, as between the original debtor and his assignee, to make the assignee the principal debtor and the original debtor a surety, but it gives the creditor a right of action against both of them, which he may pursue jointly or severally, as suits his convenience. Cases, *supra*. And this being so, the fact that he may have presented his claim to the receiver of the property of one of them, and received a part of his claim, does not bar his right to proceed against the other for the uncollected balance. Whatever view we take, therefore, of the effect of the allegations of fraud, the complaint states a cause of action.

What we have said in answer to the first contention in part answers the second. The trial court seemed to think that the depositors had a remedy against either the respondent or his assignee, for the recovery of their deposits, but not a remedy against both of them, and that the pursuit of one remedy was a bar to the after exercise of the other. It is undoubtedly true that, where a person has a choice of two or more remedies for the redress of one wrong, the selection of one is a bar to the subsequent exercise of any of the others, but it is at once obvious that the facts before us do not present that kind of a case. The appellants have never prosecuted this claim against the respondent in any other form of action; nor have their

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assignors so prosecuted it. All that the respondent shows is that the appellants' assignors prosecuted the same action against another person, claiming that such other person was legally liable for the debt. But this could not relieve the respondent from his several legal liability for the debt, unless it is to be held that two persons, severally liable for one debt, cannot be pursued severally for the collection of that debt, a proposition it needs no argument to refute. The appellants and their assignors, therefore, by first pursuing the assignee of the respondent for the debt of the respondent, did not elect to make such assignee their sole debtor, and this being true, there was no such election of remedies by them as will bar the present action.

Nor is there anything in the case of *Gaffney v. Megrath*, 23 Wash. 456, 39 Pac. 973, that is opposed to this conclusion. In that case it appeared that Gaffney held a judgment against Megrath, which she placed in the hands of her attorney for collection. In payment of the judgment, the attorney took certain personal property of the judgment debtor, which he afterwards converted to his own use and refused to account therefor. Gaffney thereupon brought an action against the attorney for the value of the property so taken. She recovered a judgment against him, but failed on execution, whereupon she sought to enforce her original judgment against Megrath. It was held that, while the act of the attorney in taking property for the debt was unauthorized, and could have been repudiated by the judgment creditor when brought to her attention, yet she affirmed the act by proceeding against her attorney for the property, and could not afterwards repudiate it.

The difference between that case and this one is that there the debtor paid the debt to the creditor's agent, but not in the kind of property the creditor was obligated to accept. The creditor, therefore, had an option, when the property was presented to her, either to take it or refuse it, and having chosen to take it, she could not after-

wards repudiate her choice. But in the case before us, the respondent has not paid the debt to either the appellants, their assignors, or their agents, in any kind of property. It may be inferred that he turned property over to a third person who in consideration of its receipt promised to pay the debts due them. This, however, as we have shown, but gave the creditors further security for their debt—it did not relieve the respondent of his obligation.

The third contention is also without merit. A judgment to the effect that the receiver's insolvent owed the respondent, and that the respondent was entitled to a proportionate share of the insolvent's property, is not an adjudication that the respondent is not indebted to other creditors of the same insolvent. Had the other creditors joined issue on the respondent's claim, and sought to have his *pro rata* share paid over to them on their indebtedness, the order of the court granting or refusing that demand might have been a final determination of the question whether or not the respondent was obligated on the demands the creditors were seeking to enforce against the property in the receiver's hands; but no such issue was presented or tried, so far as the pleadings show, and hence the order cannot be *res judicata* of that question.

The judgment is reversed, and the cause remanded for trial.

MOUNT, C. J., RUDKIN, CROW, HADLEY, and DUNBAR, JJ., concur.

ROOT, J., having been of counsel for interested parties, took no part.

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Statement of Case.

[No. 5625. Decided September 6, 1905.]

BENJAMIN H. PETERSON, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.¹

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE—INJURY TO DRIVER OF TEAM THROUGH OBSTRUCTION IN STREET UNDERGOING REPAIRS—TEAM BEYOND CONTROL—VERDICT CONCLUSIVE ON QUESTION OF FACT. There is sufficient evidence to sustain a verdict for the driver of a team, whose horses got beyond his control in coming down a steep grade, and who was thrown from his wagon by obstructions at the street intersection, where it appears that the city, in repairing the intersecting street at the foot of the grade, left a sudden depression, and further obstructed the same with wide planks on each side of street car tracks, without closing the approach to the street, or giving notice of the danger; and the verdict is conclusive on the question of fact.

SAME—DUTY OF CITY. Where a city is improving a street and fails to close it for public travel, it owes the same duty to keep it in a reasonably safe condition as in the case of other streets, in view of the work going on and all the circumstances, and to use reasonable precautions to guard the public from injury.

SAME—ACCIDENTS IN CASE OF RUNAWAY TEAM—OBSTRUCTIONS PROXIMATE CAUSE—INSTRUCTIONS. In an action for injuries sustained through an obstruction in a street by the driver of a team that was running away, it is not error to refuse an instruction to the effect that the city is not bound to anticipate accidents from, or make its streets safe for, runaway teams, where the instruction was not qualified by a statement that the city would be liable if the proximate cause of the accident was the unsafe condition of the street, without negligence on the part of the plaintiff, and where other instructions properly stated the law on the subject.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 26, 1904, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained through an obstruction in a street. Affirmed.

William Parmerlee (*Scott Calhoun* and *Gilbert F. Bogue*, of counsel), for appellant.

¹Reported in 82 Pac. 140.

Graves, Palmer, Brown & Murphy and Robert F. Booth,
for respondent.

CROW, J.—Action by respondent, Benjamin H. Peterson, against the city of Seattle, appellant, to recover damages for personal injuries sustained. Denny Way, a public street in the city of Seattle, running east and west, intersects Eastlake avenue, another public street running north and south. Denny Way, as it approaches Eastlake avenue, from the east, has a very steep descending grade, but at the crossing comes to a level, and continues west with but little grade, if any. On Eastlake avenue are two parallel street car tracks, extending north and south, at right angles to Denny Way.

On July 22, 1903, and for some time prior thereto, the city had been repairing Eastlake avenue, by constructing new sidewalks and making other improvements, and in doing said work, had removed a number of large planks from said sidewalk and street, and had plowed the surface of the ground, making a sudden depression where Denny Way intersected the east line of said avenue. Wide planks were left on each side of the street car tracks, flush with the rails, thus causing another obstruction at the outer edges of said planks. During the progress of said improvements, Eastlake avenue remained unguarded and open for public travel.

On said July 22, 1903, respondent, in charge of a team and wagon, was driving down Denny Way towards Eastlake avenue. The wagon, at the time empty, was designed for hauling dirt or gravel, having a bed composed of loose pieces which could be readily removed in unloading. Respondent, standing on this wagon bed, temporarily lost control of his horses, but regained control just as he reached Eastlake avenue, where the wagon first received a jolt, and immediately afterwards struck the obstruction at the car rails, causing the wagon bed to be jarred loose and thrown

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into the air. Respondent being then carried or drawn to the west line of said avenue, was thrown violently to the ground, was run over by the wagon, and sustained the injuries complained of. The horses ran away, and were afterwards found some considerable distance from the scene of the accident. Respondent testified that he had no knowledge of the conditions at said crossing, not being familiar with that locality. From a verdict and judgment for \$1,250 in favor of respondent, this appeal has been taken.

Appellant's first contention is that the trial court erred in denying its challenge to the sufficiency of the evidence offered by respondent, and in support of this proposition contends, that the work of said improvement was not done in a careless or negligent manner; that respondent's horses were running down a steep grade, which stopped abruptly at Denny Way, and that his wagon, being built of loose boards, would, with the concussion, go to pieces when it struck the line of Eastlake avenue, whether the planking had been removed or not; that, if this was not the case, then the rails of the car tracks accomplished the wreck and caused the accident; and that it was not the duty of the city to remove the car rails in anticipation of some runaway team coming madly down Denny Way.

Upon all these points, there was more or less conflict of evidence, and it was for the jury to determine the issues of fact involved. Questions of fact arose as to whether the running of the horses, or the unsafe condition of the street, was the proximate cause of the accident; also, as to whether the street, being left open, was in a reasonably safe condition for public travel; and whether the city had been guilty of negligence, or respondent was guilty of contributory negligence. These questions were for the jury, and there was sufficient evidence to warrant their submission for its determination. In weighing the evidence and arriving at its verdict, the jury must have found, and was warranted by the evidence in finding, that said street was

in an unsafe and dangerous condition, that the city was guilty of negligence, that respondent was not guilty of contributory negligence, and that the unsafe condition of said street was, without negligence on the part of respondent, the proximate cause of the accident. Upon these facts, respondent was entitled to a verdict. *Gray v. Washington Water Power Co.*, 27 Wash. 713, 68 Pac. 360.

Appellant contends that the trial court erred in giving the following instruction to the jury:

"Now a city has the right, and it is its duty under certain conditions, to improve a public highway, and in the progress of the improvement it has the right, and necessarily must, on occasion tear up the street and put it in a less safe condition than it formerly was, and it should have a right, if it becomes necessary, to render a street impassible during the progress of the work, to close it entirely to public travel. But if while the work is in progress the city does hold it open for public travel and invite the public to cross over it, the same duty is upon the city as in the case of an ordinary street, which is not being improved, to see that it is kept in a reasonably safe condition for public travel in view of the improvement and work going on and all of the surrounding circumstances. Now, applying the evidence to that proposition of law, it is for you to say whether at the time and place in question this street intersection was kept by the city in a reasonably safe condition for public travel."

We think this instruction was proper, and fairly stated the law of the case. Appellant, however, contends that, while it is the usual rule of law that a city is required to keep its streets and highways in a reasonably safe condition for passers-by, that this rule has no application to a street undergoing repairs or public improvements, and requested the trial court to give an unqualified instruction to that effect, which was refused; and appellant, in its brief, now urges the proposition that said duty ordinarily resting upon the city is remitted during the time occupied in making repairs or improvements, and cites the following

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authorities: *Lincoln v. Calvert*, 39 Neb. 305, 58 N. W. 115; *South Omaha v. Burke*, 3 Neb. (Unof.) 309, 91 N. W. 562; *James v. San Francisco*, 6 Cal. 528; 65 Am. Dec. 526; *Williams Bros. v. Tripp*, 11 R. I. 447; *Jones, Negligence of Mun. Corp.*, § 84.

We have carefully examined all these citations, and are of the opinion that they do not support appellant's position in this case. But were they in point, we could not follow them, as it is the well-established law of this state, as announced by this court, that, if a city undertakes to alter, repair, or improve its streets, it is in duty bound to use reasonable precautions to guard the public from injury, and in doing so may, if necessary, temporarily close said street from public travel. *Carroll v. Centralia Water Co.*, 5 Wash. 613, 32 Pac. 609, 33 Pac. 431; *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847; *Sproul v. Seattle*, 17 Wash. 256, 49 Pac. 489; *Rowe v. Ballard*, 19 Wash. 1, 52 Pac. 321; *Drake v. Seattle*, 30 Wash. 81, 70 Pac. 231. The evidence in this case tended to show that said Eastlake avenue was in a very dangerous condition for public travel, especially for vehicles coming down Denny Way and crossing said avenue. No guards were placed across Denny Way, nor was any other method adopted which would have warned respondent of any impending danger.

The trial court refused the following instruction requested by appellant:

"A city is only required to guard against danger from the ordinary and customary uses of its streets, and cannot be compelled to anticipate that an accident will happen from some unforeseen cause, such, for instance, as a runaway team of horses. That it is not required to anticipate and meet such conditions or to make its streets safe for runaway teams."

This instruction, as an abstract proposition of law, may be correct, as far as it goes, but it is not qualified in

any way. It omits any instruction to the effect that, if a dangerous condition in a street is the proximate cause of an injury to the driver of a runaway team, the city will be liable, provided said driver be himself free from negligence. In other instructions given, the jury were properly informed as to the law on both of these points; appellant, therefore, was not prejudiced by the refusal of the court to give the instruction as requested.

We find no error in the record, and the judgment is affirmed.

MOUNT, C. J., RUDKIN, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

Root, J., having been of counsel, took no part.

[No. 5542. Decided September 6, 1905.]

AUGUST KUBILLUS *et al.*, Appellants, v. ALBERT EWERT *et al.*, Respondents.¹

APPEAL—NOTICE—TIME FOR TAKING. The time for taking an appeal from a judgment commences to run from the time of overruling a motion for a new trial seasonably made.

NEW TRIAL—TIME FOR FILING APPLICATION—COMPUTATION—HOLIDAYS EXCLUDED. Under Bal. Code, § 5075, requiring a motion for a new trial to be filed within two days, and § 4790, excluding holidays, a motion for a new trial is in time if made on the fourth day, where two consecutive legal holidays intervene.

APPEAL—DISMISSAL—MOTION DOCKET. A motion to dismiss an appeal not placed on the motion docket is technically not before the court upon the hearing on the merits, where respondent files no printed brief, but may be considered when principally relied on by the respondent.

APPEAL AND ERROR — RECORD — REVIEW — EVIDENCE ON DISSOLVING TEMPORARY RESTRAINING ORDER NOT BROUGHT UP. An order dissolving a temporary restraining order will not be reviewed on appeal where the oral evidence heard and considered on the motion is not brought up in the record.

¹Reported in 82 Pac. 147.

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CONTRACTS — CONSTRUCTION — SALE OF BUSINESS — CONDITION FOR BENEFIT OF VENDEES THAT A LEASE BE SECURED—WAIVER BY VENDEES—REFUSAL OF VENDORS TO PERFORM—MEETING OF MINDS OF PARTIES. A condition in an agreement for the sale of a butchering business, providing that the vendees shall have until a certain date to secure a lease of the premises, which they undertake to do, and that the contract shall be at an end and the purchase money returned if a lease cannot be secured, is for the sole benefit of the vendees and may be waived by them, making the sale absolute and binding on the vendors.

PARTNERSHIP—CONTRACTS—AUTHORITY OF CO-PARTNER TO EXECUTE—EVIDENCE—SUFFICIENCY. Evidence that one partner was not satisfied with a contract of sale, is not evidence of want of authority of his copartner to make it, there being no evidence that the price was inadequate.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered July 2, 1903, upon granting a nonsuit at the close of plaintiffs' testimony, after a trial before the court and a jury, in an action on contract. Reversed.

Samuel R. Stern, for appellants.

H. W. Canfield, for respondents.

HADLEY, J.—Respondents have moved to dismiss this appeal. The ground urged is that the motion for new trial was neither seasonably served nor filed, and that the appeal was therefore not taken in time. The judgment was entered July 2, 1903, and the motion for new trial was both served and filed on the 6th day of the same month. The motion was overruled on the 10th day of February, 1904, and the appeal was taken April 28, 1904. If the motion for new trial was seasonably filed, then the time for appeal began to run from the date the motion was overruled. *State ex rel. Payson v. Chapman*, 35 Wash. 64, 76 Pac. 525; *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535, 77 Pac. 839.

Respondents urge, however, that the motion was not seasonably filed, and that the time for appeal began to run from the date of the judgment. Bal. Code, § 5075, requires that the motion shall be filed within two days, whereas four

days elapsed in the case at bar. Under ordinary conditions, therefore, the motion would not have been seasonably filed, and the motion to dismiss the appeal would have been well taken. But reference to the calendar for the year 1903 discloses that two consecutive legal holidays intervened between the date of the judgment and the date of serving and filing the motion for new trial. The judgment having been entered on the 2d day of July, appellants were, under the statute, entitled to the whole of the fourth day of the month within which to file their motion. That day was, however, a holiday, and the motion could not be filed during said day. The day was also a Saturday, and the next day being Sunday, the motion could not be filed until the following day. It was served and filed on Monday, and was seasonably filed within the rule stated in Bal. Code. § 4790, which is as follows:

“The time within which an act is to be done as herein provided shall be computed by excluding the first day and including the last, unless the last day is a holiday or Sunday, and then it is also excluded.”

The motion to dismiss the appeal must therefore be denied.

Respondents, in their brief upon the motion to dismiss the appeal, urge with earnestness that the motion should be sustained, and that they should be relieved of the burden of filing an answering brief upon the merits of the case. Notice was given that the motion would be brought on for hearing on the 17th day of February, 1905, but the notice and motion did not reach the clerk's office of this court in time to be placed upon the motion docket for said day, within the terms of subdivision 3 of rule 17 of this court. It was therefore not placed upon the motion docket, and was not heard on the day named. The record discloses no further effort to have the motion brought on for hearing, and in that condition, the court found it when the cause was submitted on its merits. Technically, therefore, the motion is not before us for consideration; but, inasmuch

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as respondents seem to have relied upon it with assurance, and apparently for that reason have not filed an answering brief upon the merits, we have thought best to consider and pass upon the motion. In considering the merits, we are without the benefit of any brief from respondents.

The second amended complaint alleges, that the plaintiffs are copartners in business, as butchers and dealers in meat; that on or about the 25th day of October, 1902, the defendants Albert Ewert and Henry Behrens were copartners, and were carrying on a meat market and butchering business at Palouse, Washington; that on said date the plaintiffs and said defendants entered into an agreement, in writing, whereby the defendants agreed to sell, and the plaintiffs agreed to buy, the good will of said business and certain property connected therewith, for the sum of \$700; that a tender in gold of the full amount was made within the time provided by the contract, and that the same was refused by the defendants; that plaintiffs have made several attempts to secure possession of said business and property, but defendants have refused to yield possession thereof. Damages are demanded. Under the first complaint filed, a restraining order was sought to prevent the defendants from continuing their said business, and from disposing of the property pending the action. A temporary restraining order was issued, and was afterwards on motion dissolved. Appellants urge that the court erred in dissolving the restraining order. It appears from the record, however, that oral testimony was heard and considered upon the motion to dissolve. That testimony is not before us, and we shall therefore not undertake to say that the court erred in dissolving the restraining order. We cannot know what facts were made to appear by the testimony submitted at that time.

The answer denies that the defendants agreed to sell the property mentioned in the complaint. It is admitted that the defendant Albert Ewert signed the written agreement,

which purports to have been executed by him in behalf of the partnership of Ewert & Co., but it is alleged that he was not authorized to make the contract. The cause came on for trial before a jury, and at the close of the plaintiffs' testimony, the defendants moved for a nonsuit, which was granted, and judgment was accordingly entered. The plaintiffs have appealed from the judgment.

The written agreement was admitted in evidence, and its terms are substantially as stated above. It, however, contains the following:

"The parties of the second part promise and agree to purchase said property from said first parties and to pay therefor the sum of seven hundred dollars in cash, provided that the parties of the second part can secure from the owner of the said meat market a lease of said property for at least two years, at a monthly rental of not to exceed twelve dollars (\$12). The parties of the second part agree to undertake at once to secure such a lease and as soon as it can be secured, if at all, they will pay to said first parties said sum of seven hundred dollars. The parties of the second part hereby pay \$100 to bind this agreement, said amount to be retained by first parties in escrow until the parties of the second part secure such a lease, provided it can be secured, and then and in that event said \$100 is to be deducted from said purchase price of \$700. If such lease cannot be secured on or before November 10th, 1902, said \$100 to be returned to second parties, and this contract to be at an end."

The evidence shows that appellants were unable to procure the lease mentioned, at least before the time that respondents refused to carry out the contract. By the express terms of the contract, they, however, had until the 10th day of November to procure the lease, and, before the expiration of that time, they decided to waive that provision of the contract. They so informed respondents, and tendered them the full purchase price in gold. In ruling upon the motion for nonsuit, the trial court construed the provision of the

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contract with regard to appellants procuring the lease, and observed as follows:

"I shall sustain the motion for a nonsuit. The contract is, in my opinion, by its terms and under the testimony, only an agreement to be in effect and be a contract in the event that it transpires afterwards that a lease for one year is procured by plaintiffs of this building. The condition did not happen or rather the event did not happen, and in my opinion the facts do not make a contract. Prior to the time the condition was waived, the offer was withdrawn or attempted to be withdrawn by the defendants, and they had as good a right to withdraw their offer as plaintiffs had to alter the terms of the agreement. There was no time when the minds of the parties actually met."

We believe the court was in error in its construction of said provision of the contract. It was a provision which was inserted wholly for the benefit of appellants. It was entirely immaterial to respondents whether appellants procured the lease of a third person's premises or not. The agreement was in form an absolute one, whereby respondents agreed to sell certain property at a stated price, but in effect accorded to appellants the privilege of withdrawing from the contract, if they were unable to procure the lease of certain premises. The trial court construed the respondents' obligation to be a mere offer to sell, subject to the condition that appellants could procure the lease, and that, when it developed that the lease could not be procured, the respondents had a right to withdraw their offer. We think respondents' obligation was more than a mere offer, and that it was an absolute agreement on their part to sell, the only condition being manifestly intended for the benefit of appellants alone, and which they could waive, within the following authorities: Benjamin, Sales (7th ed.), § 566; *Detroit Heating etc. Co. v. Stevens*, 16 Utah 177, 52 Pac. 379; *Blethen v. Blake*, 44 Cal. 117; *Hobart v. Beers*, 26 Kan. 329; 29 Am. & Eng. Ency. Law (2d ed.), 1107. In

Hobart v. Beers, supra, Brewer, Justice, delivering the opinion of the court, said:

“Whenever in a contract there is inserted a stipulation for the benefit of one party, as a general rule such stipulation may be waived by that party, and it is error to say to the jury that a waiver of such stipulation must be consented to by both parties, or is binding on neither. The rule is that, if the party benefited thereby waives it, the other may not complain.”

At the time the nonsuit was granted, there was no evidence to the effect that respondent Albert Ewert was not authorized by his partner to make the contract of sale at the time it was made. The evidence merely showed that the partner was afterwards not satisfied with the price, but the testimony did not show that the price was inadequate. We therefore think the evidence was such that it was error to grant the nonsuit.

The judgment is reversed and the cause remanded, with instructions to grant a new trial.

MOUNT, C. J., FULLERTON, RUDKIN, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 5447. Decided September 7, 1905.]

TACOMA MILL COMPANY, *Appellant*, v. A. P. PERRY,
Respondent.¹

CONTRACTS—TO CUT LOGS ON LANDS OF ANOTHER—CERTAINTY—PRICE FIXED BY THIRD PARTY. A contract for the cutting of timber on the land of another is not incomplete because the price was left to be fixed by a third person.

ACTIONS—TORT OR CONTRACT—TRESPASS—FOR CUTTING TIMBER—TREBLE DAMAGES—ACTION FOR—NO RECOVERY ON CONTRACT. An action for treble damages for unlawfully cutting timber on the land of another, under Bal. Code, §§ 5656, 5657, sounds in tort for a trespass, and no recovery can be had thereon upon proof of a contract agreeing to pay the value of the timber cut.

¹Reported in 82 Pac. 140.

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Opinion Per CROW, J.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered August 1, 1904, upon the special verdict of a jury rendered in favor of the defendant, in an action of trespass. Affirmed.

G. C. Israel, for appellant.

Vance & Mitchell, for respondent.

CROW, J.—Appellant, the Tacoma Mill Company, instituted this action in the superior court of Thurston county, to recover treble damages in the total sum of \$1,462.50, under the provisions of Bal. Code, §§ 5656, 5657, for a wilful trespass alleged to have been committed by respondent, A. P. Perry, early in 1901, in entering upon a portion of section 13, township 16, north, range 1, west, land belonging to appellant, and without lawful authority cutting and removing timber therefrom. Respondent in his answer denied the alleged trespass, admitted having cut timber of the value of \$109.02, and alleged that he had lawful authority therefor, having in 1897 purchased said timber, by contract made by respondent with one Hansen, the duly authorized manager of appellant, which contract was afterwards, in 1901, before said cutting, modified by agreement with one Hill, then manager for appellant. Appellant having by its reply denied such alleged contract, a trial was had, and the jury answered special questions submitted by the court as follows:

“Q. What amount of timber in thousand feet, board measure, did the defendant cut upon the lands in controversy? A. 275,000 feet. Q. What was the market value per thousand feet, board measure, of the timber cut on the lands in controversy, and at the time defendant cut said timber? A. \$1.00 per thousand. Q. Did the defendant, at the time he cut the timber on the lands in controversy, have any contract or agreement, with the Tacoma Mill Company, as to section 13, in township 16, north of range 1, west, whereby he promised to, or was authorized by, said Tacoma Mill Company to cut said timber? A. Yes. Q. Was the

entry and cutting of timber by the defendant, A. P. Perry, upon the lands of the plaintiff, the Tacoma Mill Company, with lawful authority from the Tacoma Mill Company? A. Yes. Q. Did Perry cut the timber on section 13 pursuant to an agreement with the Tacoma Mill Company, made with Hansen in the first instance, and modified between him and Mr. Hill, and already partly executed? A. Yes. Q. Was such modification, if you find one to have been made, assented to by Perry solely to avoid trouble? A. Yes."

The jury also returned a general verdict in favor of respondent. Appellant, relying upon the special findings, moved for judgment for \$275, and costs, notwithstanding the general verdict; which motion being denied, it also moved for a new trial, which was refused; and judgment being entered for respondent, this appeal has been taken.

Several assignments of error are made, but in substance they present only two propositions: (1) That the special findings made by the jury are not supported by competent evidence; (2) that the court erred in denying appellant's motion for judgment, and in entering judgment for respondent. Appellant contends that the contract for cutting, pleaded by respondent, and evidently found by the jury, was not sustained by competent evidence. Respondent testified that the contract was originally made in 1897 with appellant's manager Hansen, and stipulated that respondent was to cut the timber and that one Morris, appellant's cruiser, should state what the timber on section 13 was worth, and, when he did so state, the amount fixed by him should be the contract price. Appellant contends that, as the exact price was not expressly fixed by respondent and itself, but was left to Morris, no complete contract was shown, but simply preliminary negotiations for a possible contract. We think this contention cannot be sustained; also, that the record shows ample evidence to sustain all special findings made by the jury.

The jury found that respondent, under contract and with lawful authority, had cut timber of the value of \$275, and

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appellant offering to waive his claim for treble damages, moved for judgment in that sum. This is an action sounding in tort, appellant having proceeded under said §§5656 and 5657, reading as follows:

"§ 5656. Whenever any person shall cut down, girdle, or otherwise injure or carry off any tree, timber, or shrub on the land of another person, . . . without lawful authority, in an action by such person, . . . against the person committing such trespasses, . . . if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be.

"§ 5657. If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodlands, for the purpose of repairing any public highway or bridge upon the land, or adjoining it, judgment shall only be given for single damages."

Under the above sections, a recovery, whether of treble damages under the former, or single damages under the latter, can be had only for a trespass committed. Respondent, however, committed no trespass, and appellant cannot recover in this action, sounding in tort, any sum that may be found to be due upon contract.

"A recovery cannot be had upon proof of a contract, express or implied, on a complaint setting up an action sounding in tort, and *vice versa* when the complaint sets forth a cause of action *ex contractu* a recovery cannot be had upon proof of tort, on failure to prove the contract." 2 Abbott, Trial Brief, p. 1683, §129.

This court has held that, under our code, an action in tort and an action on contract cannot be joined. See, *Clark v. Great Northern R. Co.*, 31 Wash. 658, 72 Pac. 477, and *Sanders v. Stimson Mill Co.*, 34 Wash. 357, 75 Pac. 974. In the latter case the holding, also, is that one suing in tort cannot

recover by reason of a contract which would have entitled him to recover in a separate action. We regard the above authorities as controlling in this case.

The judgment is affirmed.

MOUNT, C. J., RUDKIN, ROOT, HADLEY, and DUNBAR, JJ., concur.

[No. 5609. Decided September 7, 1905.]

LYDIA HOFFMEISTER *et al.*, Appellants, v. RENTON
CO-OPERATIVE COAL COMPANY *et al.*,
*Respondents.*¹

ACTIONS — DISMISSAL FOR FAILURE TO PROSECUTE — LACHES. An action of ejectment is properly dismissed for laches of the plaintiffs in failing to prosecute it, where it appears that they waited until within eight days of ten years before bringing the action, took five years to bring it to an issue of fact, and then for fifteen years did nothing towards bringing the issue to trial, being all the time under no disability; especially where speculative interests are in control and the right doubtful and without moral support.

Appeal from a judgment of the superior court for King county, Hatch, J., entered September 6, 1904, dismissing a proceeding to vacate a judgment, upon sustaining demurrers to the petition. Affirmed.

Joseph M. Glasgow, for appellants.

Piles, Donworth, Howe & Farrell, and *Hugh A. Tait*, for respondents.

FULLERTON, J.—This is an appeal from an order refusing to vacate and set aside a judgment of dismissal. While the petition for the vacation as filed contains some 108 pages of closely printed matter, its salient points can be summarized in much fewer words. In brief, the case is this: On June 15, 1872, one David Maurer obtained title, under

¹Reported in 82 Pac. 127.

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Opinion Per FULLERTON, J.

the preemption laws of the United States, to a certain quarter section of land, situated in King county, in this state, and on March 20, 1873, conveyed the same, as an unmarried man, to one Robert Abrams, who at once entered into possession of the property. Maurer died intestate on April 17, 1873. On February 28, 1874, Abrams and wife conveyed the property to one Ruel Robinson, who in turn on May 18, 1874, conveyed it to the Renton Coal Company, the predecessor in interest of the respondent.

On March 12, 1883, Sarah Maurer, claiming to be the widow of David Maurer, and certain other persons, all adults, claiming to be children of David and Sarah Maurer, and heirs at law of David Maurer, began an action of ejectment, in the then district court of the territory of Washington, holding terms in King county, against the Renton Coal Company, and others, then in the possession of the land, to recover the same. Various motions and demurrers were filed in the action, which were heard and determined by the court, the case finally reaching an issue on a question of fact on May 26, 1888. Prior to this time, commissions to take depositions had been issued, and the depositions of certain of witnesses had been taken and returned, but no movement in court to put the case to trial was thereafter taken by either party.

On November 20, 1900, the respondents moved the court to dismiss the action, serving notice of its motion on the attorneys who had last represented the plaintiffs. Certain of the petitioners were then in Seattle, and consulted with various attorneys concerning their legal rights, finally employing one J. C. Zonig, who employed William Martin to represent them on the hearing to be had on the motion to dismiss. This motion was called up on February 26, 1901, at which time a judgment dismissing the action for want of prosecution was entered.

On January 21, 1902, the appellants filed their original

petition to vacate and set aside the last mentioned judgment. To this, several amendments were made, resulting in the one now before the court. To the last petition, the respondents demurred, which demurrer the court sustained, and on the refusal of the appellants to plead further, entered an order dismissing the petition. It is from this last mentioned order that this appeal is taken.

The order appealed from was properly entered. Conceding that the appellants have shown cause sufficient to excuse their failure to appeal from the judgment of dismissal, we think they have failed to show any cause for vacating that judgment. The cause of action they now seek to prosecute arose in 1873. The plaintiffs were then all adults, suffering from no legal disability which rendered them incapable of prosecuting the action in their own right; yet they waited within eight days of ten years, before bringing their action at all, took five years more to bring it to an issue of fact, and then for nearly fifteen years did nothing looking towards bringing the issue to trial. Had the petitioners been laboring under some disability, rendering them incapable of prosecuting the action individually, for the whole, or some considerable portion, of this period, they might, with some reason, claim that the neglect of the persons to whom was intrusted the duty of prosecuting it should not be visited upon them, but the excuses here offered are barren of everything that appeals to the conscience of the court. The record presents a case of neglect, pure and simple, by those in whom the right of action originally vested, and contains a very pregnant admission that its sudden revival owes its origin to the fact that speculative interests are now in control. While it is true that a rightful cause of action should not be turned down merely because it is prosecuted by persons who have a speculative interest in its result, yet this is an element worthy of consideration when the right to further prosecute is a matter of discretion with the court, and especially is it so when

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Statement of Case.

the cause of action is, at best, doubtful, or where its successful prosecution will deprive persons of property to which they are morally entitled, and would be legally so but for a mistake of law made at the time they acquired it. Without, therefore, reviewing the facts further, we are of the opinion that the case is not one that calls for the further intervention of the courts, and the order appealed from will stand affirmed.

MOUNT, C. J., HADLEY, RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5606. Decided September 7, 1905.]

JOHN ALBIN *et al.*, Respondents, v. THE SEATTLE ELECTRIC COMPANY, Appellant.¹

PLEADINGS — VARIANCE — INJURY TO PASSENGER ALIGHTING FROM STREET CAR—ALLEGATION THAT CAR WAS STOPPED AND NEGLIGENTLY STARTED—PROOF OF DEFECT IN BRAKES PREVENTING STOPPING OF CAR—ADMISSIBILITY. There is a fatal variance between allegations of a complaint that the plaintiff, a passenger, was injured by the negligent starting of a street car without warning, after it had stopped for the purpose of permitting her to alight, and proof that the brakes and sand box were defective, whereby the motorman was unable to bring the car to a stop, and that plaintiff was thrown from the car before it stopped by reason of sudden jerks due to such defects; and such proof is not admissible under a general allegation to the effect that the injury was caused by the negligence of the defendant, the same being in the nature of a conclusion from the specific allegations.

Appeal from a judgment of the superior court for King county, Hatch, J., entered November 23, 1904, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger alighting from a street car. Reversed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

John B. Hart and *H. E. Snook*, for respondents.

¹Reported in 82 Pac. 145.

CROW, J.—This action was instituted by respondents, John Albin and Anna Albin, husband and wife, against the Seattle Electric Company, to recover for personal injuries sustained by said Anna Albin. Appellant was operating a line of street cars between Ballard and the city of Seattle, and over Western avenue, in the latter city. Said Anna Albin boarded one of appellant's cars, at a point known as Smith's Cove, intending to alight at the intersection of Western avenue and Pike street. The specific acts of negligence charged in the complaint are alleged in the following language:

"That on said 9th day of January, 1902, the said plaintiff Anna Albin became a passenger on one of said defendant's cars running over the streets and ways as aforesaid, taking passengers thereon at or near said place known as Smith's Cove. That she was going to a point where said Western avenue intersects Pike street, in the city of Seattle, Washington; that there was a large number of other passengers on said car; that it was dark, being about 8:00 o'clock p. m.; that plaintiff Anna Albin informed the defendant, by its conductor, servant and employee as aforesaid, that she was going to said place, Western avenue and Pike street as aforesaid, and wanted to get off of said car at said place; that on the car reaching the vicinity of said Western avenue and Pike street, as aforesaid, the conductor, being in charge of said car, announced said intersection of Pike street and was told again that said plaintiff Anna Albin was desirous of leaving said car at said place; that in the vicinity of Pike street aforesaid and a little south thereof, the car was stopped and brought to a standing still position; that said plaintiff, having arisen from her seat, went to the rear end of said car for the purpose of alighting therefrom; that said car was one of the larger class of cars used by defendant in the city of Seattle; that on each end of said car and on the sides thereof, there were openings through which passengers passed in entering and leaving said cars; that just as the said plaintiff Anna Albin was at the rear end of said car and making ready and intending to depart therefrom, the said defendant and its servants and agents and employees, negligently and carelessly and without any warning or notice whatsoever, started

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ordered and caused said car to start and move forward rapidly and violently and with a jerk; that the place where said car was stopped was a little south of Pike street on an incline of the trackage and said track was wet and slippery; that on starting said car, a large amount of force and electricity was turned on, which, together with the incline of said track and its slippery condition, caused said car to lurch and jerk violently and rapidly forward; that the said plaintiff Anna Albin, being just about to alight from said car and to step from the rear end thereof onto the steps thereof, and thence to the ground, when said car started forward as aforesaid with the violent lurch and jerk as aforesaid, was by said movement of said car thrown against the rear end of said car, and onto the floor of said car and from said car onto the steps and thence onto the ground beneath, with great force and violence; that on striking said car, its steps and the ground, the said plaintiff Anna Albin was jerked forward and thrown to said ground with great force and violence through the carelessness and negligence of the defendant, its servants, agents and employees."

The complaint then proceeds to describe the injuries sustained by said Anna Albin, and contains, in the same paragraph, the following allegation:

"That the injuries herein complained of were caused through the carelessness and negligence of the defendant its servants, agents and employees, and not through any act on the part of the plaintiff, whatsoever."

All these allegation of negligence were denied by the answer, which by way of affirmative defense also pleaded contributory negligence. This affirmative defense was denied by the reply.

Upon the trial, no evidence was produced showing that said car came to a stop prior to respondent leaving it, or being thrown from it. Evidence was introduced tending to show that the tracks, which were on a heavy descending grade, were very slippery; that the motorman was unable to bring the car to a stop at Pike street; that it continued to move until it reached the next crossing at Union street;

that, while it was still moving, respondent Anna Albin arose from her seat, and walked to the rear platform for the purpose of alighting; and that while she was on said platform, the car, which was still moving, by making a sudden and violent jerk or lurch, threw her to the street. Other evidence was admitted, over appellant's objection, tending to show that said car was in a defective condition, in that the front and back brakes were not properly adjusted by being evenly balanced, and in that one of the sand boxes was out of repair. The case was not tried on the theory that the car actually stopped, or came to a standing position as alleged in the complaint, or that respondent, while trying to alight from such stationary car, was violently thrown to the street by its sudden starting; but was tried on the theory that she was thrown from a moving car by its sudden jerks or lurches.

The evidence as to the condition of the brakes and sand box was admitted in support of this latter theory, respondents' claim, as we understand it, being that these defective conditions either caused the jerks or lurches, or contributed to their violence. We think the evidence of all the experts who testified, whether for appellant or respondents, had a tendency to show that the defective condition of the brakes and sand box, claimed to have existed, would not have any tendency to cause any jerks or lurches, or to make them more sudden or violent, but would make it more difficult for the motorman to stop the car on a slippery track and descending grade, and would at the same time lessen the liability to lurches or jerks. For the purposes of this argument, we will, however, assume as correct the contention of respondents to the effect that such defective conditions tended to increase the violence and suddenness of any such lurches or jerks. The jury returned a verdict for respondents, and judgment being entered thereon. this appeal has been taken.

Appellant contends that the trial court erred in admitting

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evidence relating to the condition of the brakes and the sand appliances. Appellant contends that this was an entire departure from the issues tendered by the complaint; that the first suggestion of any defective appliances was made at the trial, which took place more than two and one-half years after the accident occurred; that appellant was in no way advised by the pleadings that it would be required to meet such evidence; and that its admission raised an issue not tendered by the pleadings. Respondents contend that, in addition to the specific allegations of facts showing negligence, the complaint also charges negligence in a general manner, and that in so doing it is as broad as it is possible for a complaint to be made. Respondents base this claim upon the clause of said complaint immediately following the description of the injuries of said Anna Albin, above quoted as follows: "That the injuries herein complained of, were caused through the carelessness and negligence of the defendant, its servants, agents and employees, and not through any act on the part of plaintiff, whatsoever." Respondents, commenting on all the averments of the complaint, including this general allegation, say:

"It is hard to conceive of a broader or more general allegation of general negligence than is contained in this complaint. Under the repeated holding of this court, any evidence which would go to establish negligence of an approximate nature, producing the injuries sustained, would be competent."

Later on in their brief, respondents, in support of their contention that the evidence complained of was competent, cite a number of cases from this court, apparently placing special reliance on *Collett v. Northern Pac. R. Co.*, 23 Wash. 600, 63 Pac. 225, and *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174. A careful comparison of the allegations of negligence in the cases cited with the allegations of the complaint in this action, will show said cases not to be controlling here. Our construction of the complaint

in this action is that it contains specific allegations only, and that it does not contain any general allegations of negligence. The words above quoted are merely a statement of the legal conclusion drawn by the pleader from the preceding specific allegations, and are also intended to negative any anticipated claim of contributory negligence. The specific claim made by the complaint is that the car came to a full stop—was standing still; that, while it was stationary, respondent was attempting to alight, and that appellant, by suddenly starting the car, threw her to the ground. If the car was already stopped, a defective condition of the brake or a sand box, both to be used in stopping, could have nothing to do with the accident. In *Coleman v. Metropolitan St. R. Co.*, 82 App. Div. 435, 81 N. Y. Supp. 836, the syllabus, which states the substance of the opinion, reads as follows:

“Where the complaint, in an action to recover damages for personal injuries sustained by the plaintiff while alighting from one of the defendant’s street cars, in consequence of the negligence of the defendant in suddenly starting the car, alleged that the car had come to ‘a complete stop’ and, upon the trial, the defendant introduces evidence tending to show that the car had not come to a complete stop, the defendant is entitled to have the court charge the jury ‘that, if they find that this plaintiff stepped off the platform of this car while it was in motion at all, they must find a verdict for the defendant,’ not because it is negligence, as a matter of law, for a person to step from a moving car under any and all circumstances, but because, if the car was moving when the plaintiff stepped from it, she had not established the negligence alleged in her complaint.”

Were we to concede that the complaint contains a general allegation of negligence, still, such general allegation is explained and limited by specific allegations to such an extent that appellant could not have successfully attacked the complaint by motion to make more definite and certain. Where the only allegations in a pleading are general in their char-

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acter, are not aided by averments of specific facts, but yet are sufficient as against a general demurrer, and the opposing party has not availed himself of his right to have said general allegations made more definite and certain on motion, we think a wide latitude should be allowed by trial courts in admitting evidence. The object of all pleadings is to advise the court and the opposite party of the grounds upon which the pleader bases his right of action or defense. If an allegation of negligence is general, the opposite party may properly move the court to require the pleader to make the same definite and certain, so that he may know, with reasonable accuracy, what he is called upon to meet. If the facts constituting negligence are specifically alleged, the pleader, in presenting his evidence, should be limited to proof of such facts, otherwise there would be a variance to the prejudice of the opposite party.

This complaint contains most specific allegations of all the facts upon which respondents base their claim that appellant has been guilty of negligence, and, as we construe the pleading, it fails to make any general allegation of negligence. Mr. Austin Abbott, in the second edition of his work on Trial Brief, at page 1500, in section 330, under the title of Negligence, says: "A general allegation of negligence lets in evidence of the circumstances constituting it." This is undoubtedly the correct rule, and has been recognized by this court, but at page 1505, in section 333, Mr. Abbott also says:

"But where the general allegation is followed by a specification of the acts of negligence complained of, or the negligence is specifically set forth without general allegation, the evidence will be confined to the issues so limited, and proof of other facts will constitute a variance."

In *Toledo etc. R. Co. v. Foss*, 88 Ill. 551, the court says:

"The allegation and proof must correspond. The plaintiff could not aver negligence in one particular, and, on the trial, prove that defendant was negligent in another

regard. One object of a declaration is, to state the facts relied upon for a recovery so plainly that the defendant may be prepared to meet them. This object in pleading would be entirely defeated if a plaintiff had the right to aver in his declaration one ground of action, and on the trial, prove another and different one."

In *Carter v. Kansas City etc. R. Co.*, 65 Iowa 287, 21 N. W. 607, the court says:

"Having averred negligence, and in what the negligence consisted, we think that the plaintiff should not have been allowed to show other negligence. The defendant, it seems to us, was justified in assuming that the issue was not broader than that which the plaintiff, by his express averments, had seen fit to tender. If we should hold that the plaintiff might aver one kind of negligence and prove another, we should not only hold, in effect, that the averment had no significance, but that it was allowable for the plaintiff to so frame his petition that it should be well calculated to deceive and mislead the defendant."

See, also, *Redford v. Spokane St. R. Co.*, 9 Wash. 55, 36 Pac. 1085; *Toledo etc. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Waldhier v. The Hannibal etc. R. Co.*, 71 Mo. 514; *Santa Fe etc. R. Co. v. Hurley*, 4 Ariz. 258, 36 Pac. 216.

We think the trial court erred in admitting evidence as to the condition of the brakes and sand box. The judgment is reversed, and the cause remanded for a new trial.

MOUNT, C. J., RUDKIN, ROOT, and HADLEY, JJ., concur.

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[No. 5514. Decided September 7, 1905.]

R. CUNNINGHAM, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS — MAINTENANCE OF FIRE DEPARTMENT — GOVERNMENTAL FUNCTION — NEGLIGENCE OF EMPLOYEES — INJURIES RESULTING FROM TRESPASSING BY HORSE USED IN FIRE DEPARTMENT — NON-LIABILITY. A city is not liable for damages caused by a horse used in its fire department, which was permitted to trespass upon plaintiff's lawn through the negligence of the firemen, since the maintenance of its fire department is the exercise of a governmental function (RUDKIN and FULLERTON, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 23, 1904, upon findings in favor of the plaintiff after a trial on the merits before the court without a jury, in an action to recover for damages to plaintiff's lawn, caused by a horse kept by defendant in its fire department. Reversed.

Mitchell Gilliam and *Hugh A. Tait*, for appellant.

H. E. Foster, for respondent.

CROW, J.—Respondent instituted this action against the city of Seattle, appellant, to recover damages occasioned by a certain horse trespassing upon and destroying respondent's lawn. On trial, the court made findings of fact to the effect that, on September 6, 1904, appellant city was maintaining near respondent's residence, a certain engine house, as a part of its fire department, and keeping there numerous horses; that, on said date, through the negligence of said city, one of said horses trespassed upon respondent's lawn, by running over, tearing up, and destroying the same, and that said horse was owned, kept, and used by said city exclusively in said fire department. Upon said findings, judgment was entered in favor of respondent, and this appeal has been taken.

¹Reported in 82 Pac. 143.

It clearly appears from the evidence that said horse was in the exclusive charge, care, and control of the regular employees of said fire department. Appellant contends that no negligence on the part of the city or its employees has been shown, but, without passing on that question, we will, in disposing of this case, accept the findings as made by the trial court. Appellant further contends that, even though negligence be conceded, still it is not liable to respondent for any damage caused by its employees in the maintenance and operation of its fire department. This contention, we think, should be sustained. The maintenance of a fire department by a municipal corporation is the exercise of a public or governmental function.

"The rule is general that a municipal corporation is not liable for alleged tortious injuries to the persons or property of individuals, when engaged in the performance of public or governmental functions or duties." 20 Am. & Eng. Ency. Law (2d ed.), 1193.

The only question here is, whether appellant is liable for damage done to respondent's property by reason of negligent acts of the members of its fire department. Under the authorities, this question has been almost uniformly answered in the negative. The supreme court of Ohio, in *Frederick v. Columbus*, 58 Ohio St. 538, says:

"The ground on which the nonliability of municipal corporations is placed in such cases, is that the power conferred on them to establish a department for the protection of the property of its citizens from fire, is of a public or governmental nature, and liability for negligence in its performance does not attach to the municipality unless imposed by statute. The nonliability of the city in such cases rests upon the same reasons as does that of the sovereign exercising like powers; and are distinguished from those cases in which powers are conferred on cities for the improvement of their own territory and the property of their citizens."

The holdings of this court have been to the same effect. *Lawson v. Seattle*, 6 Wash. 184, 33 Pac. 347; *Russell v.*

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Tacoma, 8 Wash. 156, 35 Pac. 605, 40 Am. St. 895; *Simpson v. Whatcom*, 33 Wash. 392, 74 Pac. 577; *Lynch v. North Yakima*, 37 Wash. 657, 80 Pac. 79. In *Lynch v. North Yakima*, this court speaking by Root, J., said:

“But it may generally be accepted that a city is not liable for an improper discharge by its officers of a purely governmental function. The duties of an officer or employee of a fire department are regarded as for the benefit of the community, and not for the mere advantage of the municipality as a corporate body. The city possessing, as it does, a portion of the sovereignty of the state, in the exercise thereof provides and maintains a fire department. The services of this department are for the benefit of all persons who may have property in the city limits capable of injury by fire. It would seem, therefore, that in creating, maintaining, and operating the fire department the city was exercising governmental functions.”

Under the above authorities, we think the city of Seattle was not liable to respondent for damages resulting from negligent acts of the employees in its fire department. The trial court therefore erred in entering judgment for said respondent. The judgment is reversed, with instructions to dismiss the action.

MOUNT, C. J., ROOT, and HADLEY, JJ. concur.

RUDKIN, J. (dissenting)—The majority opinion states the question presented on this appeal in the following language: “The only question here is, whether appellant is liable for damage done to respondent’s property by reason of negligent acts of the members of its fire department.” It seems to me a more correct statement of the proposition would be this: Can a municipality, owning horses and having exclusive dominion over them, permit them to trespass upon the private property of others with impunity? Judge Cooley, in his work on Torts, states the rule of nonliability of municipal corporations for taking, or neglecting to take, strictly governmental action as broadly as this or any other court,

yet, in discussing the question now under consideration, the learned author says:

"Municipal corporations are to be considered first, as parts of the governmental machinery of the state, legislating for their corporators, and planning and providing for the customary local conveniences for their people; second, as corporate bodies through proper agencies putting into execution their plans, and discharging such duties as they have imposed upon themselves or as the state has imposed upon them; and, third, as artificial persons owning and managing property. In this last capacity they are chargeable with all the duties and obligations of other owners of property, and must respond for creating or suffering nuisances under the same rules which govern the responsibility of natural persons. Under this head, therefore, nothing more need be said in this place." Cooley, Torts (2d ed.), p. 738.

Judge Dillon, in his work on Municipal Corporations, states the rule as follows:

"Upon similar grounds, municipal corporations *are liable for the improper management and use of their property*, to the same extent and in the same manner as private corporations and natural persons. Unless acting under some valid, special legislative authority, they must, like individuals, use their own so as not to injure that which belongs to another, or unjustly or improperly invade private rights." 2 Dillon, Mun. Corp. (4th ed.), § 985.

In *Rowland v. Kalamazoo Superintendents of Poor*, 49 Mich. 553, 14 N. W. 494, an action was brought against the county superintendents of the poor to recover damages for negligently suffering the cholera to be communicated to the plaintiff's hogs. The court cited, Cooley on Torts, *supra*, and *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552, and said:

"An examination of the above authorities will show that municipal corporations in the care and management of their property, like an individual, are in duty bound to produce no injury to others. In clearing up the poor-farm the superintendents could not, nor could those in their employ, with impunity, negligently set fires, or carelessly permit them

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to extend to and destroy the property of their neighbors, nor could they permit the farm stock to trespass upon the lands of adjoining proprietors and claim exemption from all liability therefor."

In *Moulton v. Scarborough*, 71 Me. 267, 36 Am. Rep. 308, a town was held liable for injuries caused by a vicious ram owned by it. In *Kies v. Erie*, 135 Pa. St. 144, 19 Atl. 942, 20 Am. St. 867, it was held that the city was not liable for injuries resulting to a foot passenger through the negligence of a fireman in throwing open the doors of an engine house; but, in an action between the same parties to recover for the same wrong, the court held, in 169 Pa. St. 598, 32 Atl. 621, that the city was liable for injuries resulting from the improper construction of the engine house. Some of the authorities make a distinction between the liability of municipal corporations for injuries resulting from property held for governmental purposes and property held for gain and profit, holding that a recovery may be had in the latter case but not in the former. In view of such distinction, a recovery might be had for a trespass committed by a horse used in the street department but not in the fire department. I do not think there is any just foundation for such distinction, and the authorities generally do not recognize it. Speaking on this subject, Jones, in his work on Negligence of Mun. Corp. § 150, says:

"Moreover, the weight of authority does not justify a distinction of this character; and an examination of the cases upon this question will sustain the conclusion that municipal corporations are responsible in damages for all injuries occasioned by their negligence in the management or care of public property irrespective of the question whether an income is derived from it."

See, also, Bishop, Non-Contract Law, § 755 *et seq.*

I do not think this case depends upon the negligence of the firemen at all. It is a case of trespass, pure and simple, and the question of negligence does not necessarily enter into it. Cooley, Torts (2d ed.), p. 397. It seems to me the

majority opinion is a misapplication of the rule that a municipal corporation is not liable for injuries resulting from purely governmental action, and a perversion of the maxim that one must so use his own property as not to injure another.

The judgment should be affirmed.

FULLERTON and DUNBAR, JJ., concur with RUDKIN, J.

[No. 5561. Decided September 7, 1905.]

JONATHAN JOHNSON *et al.*, Appellants, v. THE PULLMAN STATE BANK *et al.*, Respondents.¹

COMPROMISE AND SETTLEMENT—LAND HELD AS SECURITY FOR ADVANCES—INTEREST ON ADVANCES—RATE FIXED BY NOTE ON EXTENDING TIME. Where property was purchased for another and the title held until payment of the purchase price, a settlement between the parties fixing the balance due, for which a note was given, constitutes such sum a claim upon the land, drawing interest at the rate specified in the note, and not at the legal rate; and a third party, to whom the equitable owners had assigned their interest, is not entitled to a conveyance upon payment of such sum with interest at only the legal rate.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered December 19, 1904, upon findings in favor of the defendants, after a trial before the court without a jury, in an action to recover the possession of land. Modified.

John Pattison, for appellants.

Root, J.—In the year 1891, appellant Jonathan Johnson and respondent Miles T. Hooper entered into a contract, by which Johnson was to purchase from the state of Washington a certain tract of land, for the sum of \$1,840, payable in ten equal annual payments, the money for the meeting of which was to be paid Johnson by Hooper, on or before

¹Reported in 82 Pac. 122.

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the respective payments fell due; and, on the completion of said payments, the property was to be conveyed to said Hooper, or to whom he should direct. Hooper and wife took possession of the property. On the third day of January, 1894, a settlement was had by these parties, whereby it was found that \$252.10 was due Johnson from Hooper, as a balance on account of money paid by reason of said contract. This, with some indebtedness arising from matters outside of the land transaction, was placed in the form of a promissory note, for the sum of \$400, providing for interest at the rate of one and one-half per cent per month. Subsequently \$53.32 was paid and credited upon the \$252.10, leaving a balance of \$198.78, with interest due on this item, at the time of the commencement of this action. There was due on account of other items nearly \$1,500, with interest.

On the 30th day of March, 1903, respondents Hooper and wife executed and delivered to the respondent bank a deed to the premises involved. Appellants brought this action to recover possession of the premises. The trial court directed that appellants should execute and deliver to the respondent bank a deed to said premises, upon being paid the sum of \$1,480, with interest at the rate of six per cent from February, 1904; the sum of \$198.78, with interest at the legal rate from January 3, 1894; and the sum of \$16.30 (taxes).

The only question upon this appeal is as to whether the item \$252.10 should bear merely the legal rate of interest, or carry the rate provided in the note given at the time said sum became due, January 3, 1894. Respondents contend that, as a matter of equity, they were holden to refund to appellants only such an amount as he had actually paid out, with legal interest; that, while Hooper and wife might be liable for the extra interest as a matter of law, it was not a claim against the land.

We do not regard this position tenable. On January 3, 1894, Hooper owed Johnson \$252.10. He could not, or at

least did not, pay him. It was agreed that he should have an extension of time within which to pay. At that time Johnson had his option of insisting on payment, or terminating the deal, or extending the time of payment. Hooper had his option of paying, or terminating the contract, or accepting an extension of time upon the terms offered by Johnson. He accepted the extension of time upon the terms set forth in the promissory note. The making of this note and its terms (so far as the item of \$252.10 was concerned) became a part of the transaction concerning the land in question. The rate of interest was legal at the time the note was made. Laws 1893, p. 29. Having voluntarily agreed to pay this rate of interest, and having, in consideration thereof, secured an extension of time within which to pay the principal, we can perceive no legal or equitable reason why he should not pay the same before receiving, for himself or grantees, a deed from appellants.

The decree of the honorable superior court should be modified so as to require respondents to pay to appellants interest upon the \$252.10 item at the rate provided in the note. The cause is remanded to said court, with instructions to make the modification indicated. Costs of this court to appellants.

MOUNT, C. J., CROW, RUDKIN, HADLEY, and DUNBAR, JJ., concur.

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Syllabus.

[No. 5513. Decided September 7, 1905.]

THE ESPY ESTATE COMPANY, *Appellant*, v. PACIFIC COUNTY
*et al., Respondents.*¹

MANDAMUS — TO COUNTY COMMISSIONERS — COUNTY WHEN PROPER PARTY. In a proceeding to compel the county commissioners to establish a ditch fund and levy a special assessment, to pay warrants issued in part payment of a ditch, the county is a proper party defendant, having at least an indirect interest in the property, and perhaps a direct interest in the costs.

COUNTIES — MANDAMUS TO COMPEL LIQUIDATION OF DITCH WARRANTS—ADJOURNMENT OF BOARD FOR PURPOSES OF DELAY—FAILURE TO ACT. Where the county commissioners are petitioned to establish a ditch fund and levy an assessment, by a creditor who has already waited eleven years, and they take no action on the petition except to postpone consideration until the next regular term, any valid reason for such continuance is matter of defense, and cannot be urged by the county upon a demurrer to a petition for a mandate to compel action, where the petition alleges that they do not intend to take any action in the matter or pay the indebtedness.

SAME—COMPLETION OF DITCH—ABANDONMENT OF PROJECT—FAILURE OF COUNTY TO LEVY ASSESSMENT OR ACQUIRE TITLE TO NECESSARY LAND. Where the county commissioners abandon proceedings for the construction of a ditch for a drainage district, and the property owners take no steps to compel action for six months, a creditor of the district, holding warrants issued in part payment of the ditch, may sue to require the establishment of a ditch fund and the levy of an assessment upon the property benefited or to be benefited, and it would be no defense that the ditch is not completed or that the title to necessary property had not been acquired.

SAME—LACHES OF WARRANT HOLDER—SUIT WITHIN SIX MONTHS OF ABANDONMENT OF PROCEEDINGS. The holder of warrants of a drainage district is not guilty of laches in enforcing an assessment where he commenced suit within six months after the abandonment of the project by the county.

SAME—POWERS OF COURT. In a proceeding by a warrant holder to compel the levy of an assessment to pay warrants upon an abandoned ditch project, the court could direct the levy of an assessment without completion of the ditch, or could direct its completion and the acquisition of necessary property to be followed by an assessment.

¹Reported in 82 Pac. 129.

Appeal from a judgment of the superior court for Pacific county, Irwin, J., entered October 15, 1905, dismissing a proceeding for a writ of mandamus, upon sustaining demurrers to the petition. Reversed.

Sol. Smith and William H. Gudgel, for appellant.

H. W. B. Hewen, for respondents.

Root, J.—This proceeding was brought in the superior court for a writ of mandate requiring the county commissioners of Pacific county to establish a ditch fund, and to make a special assessment, under the provisions of the act of March 19, 1895 (Laws 1895, p. 142), to pay certain warrants, issued in part payment for the construction of a ditch, and owned by appellant. These warrants were issued in the year 1893, and amount to about \$1,600, face value, besides interest amounting to nearly as much more. Under the act of March 19, 1890, said county had created a drainage district and partially completed a ditch therein. This statute was subsequently, by this court, held to be unconstitutional. *Askham v. King County*, 9 Wash. 1, 36 Pac. 1097; *Skagit County v. Stiles*, 10 Wash. 388, 39 Pac. 116.

The curative act of March 19, 1895, was thereafter enacted, and, thereunder, said county proceeded to condemn a right of way, and to acquire title to such property as was necessary for the purposes of the ditch for the construction of which the original district had been created. As a part of said proceedings, the commissioners condemned a strip of land through the property of one A. C. H. Moore and wife, situated near the lower terminus of said ditch. For the taking of this property, a judgment in the sum of \$700 was, by the court, awarded said owners, and the county was given until March 8, 1904, within which to pay therefor. On the 7th of March, 1904, the county refused to pay said award and gave notice of abandonment of said right of way.

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Opinion Per Root, J.

On the 17th of August, 1904, relator petitioned the board of county commissioners to establish a ditch fund, as required by the statute, or apportion the expense incurred in constructing said ditch, upon the property benefited, and to proceed to collect the same. The board took no action regarding said petition except to postpone the consideration thereof until the next regular term to be holden in the succeeding October. It is alleged by relator that this continuance of the hearing was solely for delay. It is further alleged that neither the respondents, nor the persons whose property was and is benefited by the ditch, have paid, or intend to pay, anything toward liquidating the indebtedness evidenced by these warrants.

Relator's motion for a writ was based upon the foregoing and other facts, set forth in an affidavit, to which the county and the board of commissioners separately demurred, upon the grounds of misjoinder and that the affidavit did not state facts sufficient to constitute a cause of action. The trial court sustained each of the demurrers. Relator electing to stand upon its affidavit, a judgment of dismissal was entered. From this judgment, an appeal is taken to this court.

It is contended by respondents that the county was neither a necessary nor proper party. We do not think it was a necessary party; but as this was a proceeding affecting property and property rights within its limits, and in which it at least had an indirect interest, and involved costs as to which it might possibly have a direct interest, we think it was a proper party. *American Bridge Co. v. Wheeler*, 35 Wash. 40, 76 Pac. 534. The condemnation proceedings are required to be in the name of the county.

It is urged that it does not appear that the board of commissioners refused or neglected to comply with relator's request; that the postponement of the consideration of the petition to its next regular meeting should not be deemed such refusal or neglect. If there were any good reason for

the continuance, it could have been set up as a defense. These warrants had been held without payment for about eleven years. In the absence of assurances that the board intended to take some steps looking to their payment, we do not think relator was under any obligations to wait longer. No suggestion is made that the board did do anything with the matter at its next regular session, although nearly a year has since expired. If steps had then been taken to provide the fund and make the desired assessment, a suggestion thereof to the court would have worked a suspension or termination of this proceeding.

Contention is made, that the performance of no clear legal duty has been refused; that the ditch in question has not been completed, and the necessary property not condemned or acquired, and that the board has no jurisdiction to assess the benefits until that is done; and that it is not alleged that the board has ability to borrow money for the fund in the manner required by the statute.

It affirmatively appears that, after the amount of an award had been announced by the court as to certain property taken, the board abandoned the taking of the property, and did nothing thereafter to consummate the acquisition of the property necessary to the completion and maintenance of said ditch. Having thus abandoned the project as contemplated, we think this relator, as a creditor, was not obliged to wait thereafter longer than it did before commencing this proceeding. Upon the abandonment of the undertaking, the property owners benefited, or to be benefited, by the ditch could undoubtedly have compelled the board of commissioners to proceed with the condemnation proceedings, or to in some way acquire title to the property necessary for the construction and use of the ditch, and to complete the same, if it were not already finished. But it does not appear that any such steps were taken. The abandonment was announced March 7, 1904. After waiting until September 8, 1904, relator instituted this pro-

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ceeding. We do not think respondents can be heard to say that, because title to all necessary property has not been obtained, they are not required to establish the ditch fund and levy the assessment contemplated by the statute. Those who did work in constructing this ditch are entitled to their pay. Neither the neglect of the commissioners, nor the indifference of the property owners, should be permitted to prevent such payment.

It is urged that relator has been guilty of laches. We think not. Relator could not have maintained this action until the necessary property was acquired or the project abandoned. The latter event occurred only six months prior to the commencement of this proceeding. If, prior to said abandonment, there was unnecessary delay in prosecuting the condemnation proceedings, it would appear to have been the fault of respondents rather than of relator. Respondents ought not to be permitted to take the advantage of their own wrong.

If the facts as set forth in appellant's affidavit are established upon the trial, the writ should issue; and, if the board does not borrow the money, or otherwise secure its production and pay these warrants, then the aggregate cost of said ditch should be, by said commissioners, apportioned to each lot, tract of land, road or railroad, according to the benefit which has, and will, result thereto, respectively, not exceeding the amount of such benefit, in accordance with the provisions of the statute. Any objection, by such owners of benefited property, that the condemnation proceedings and the construction of the ditch have not been completed should not be deemed any defense to the right to make the assessment. The trial court could properly direct the commissioners to proceed as aforesaid, or it could require them to proceed immediately and acquire, by condemnation or otherwise, the property necessary to the completion of the ditch, and then levy the assessment as provided by the statute.

Whichever course is taken, prompt action should be required and no unnecessary delay anywhere permitted.

The judgment of the honorable superior court is reversed, and the cause remanded, with instructions to overrule both of the demurrers, and to proceed with the matter in accordance with the views herein expressed.

MOUNT, C. J., CROW, RUDKIN, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

[No. 5664. Decided September 8, 1905.]

ADOLPH ENGLER, *Appellant*, v. THE CITY OF SEATTLE,
Respondent.¹

MASTER AND SERVANT—WHEN RELATION EXISTS—MUNICIPAL CORPORATION AND INDEPENDENT CONTRACTOR—PERSONAL INJURIES TO EMPLOYEE OF CONTRACTOR ON STREET WORK—NEGLIGENCE OF CITY ENGINEER—POWER TO SUPERINTEND WORK AND DISCHARGE MEN. A contractor for the construction of a cement sidewalk, having full control of the manner of doing the work and the selection of his men and materials, is an independent contractor, although his contract provides that the improvement shall be under the superintendence of the city engineer, whose directions shall be obeyed, that orders shall be given to the contractor or his superintendent having immediate charge, and that incompetent men shall be discharged on his requisition; and the city is therefore not liable to an employee of the contractor, a laborer in a gravel pit, for injuries sustained through obeying an order of the city engineer to work in a dangerous place; since the contract gave the engineer no right to direct individual employees, and the power of superintendence does not affect the relation of an independent contractor.

Appeal from a judgment of the superior court for King county, Hatch, J., entered October 12, 1904, upon granting a nonsuit at the close of plaintiff's case, in an action for personal injuries sustained by a laborer in a sand pit. Affirmed.

¹Reported in 82 Pac. 136.

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Benson & Hall and *Waterman & Hendron*, for appellant.
William Parmelee (*Scott Calhoun*, of counsel), for respondent.

CROW, J.—Action by appellant, Adolph Engler, against the city of Seattle, respondent, to recover damages for personal injuries sustained. In his amended complaint, appellant alleged: That on September 14, 1901, respondent entered into a written contract with T. Ryan & Company, a copartnership, by the terms of which said Ryan & Company were to construct a cement sidewalk and certain other improvements, on Second avenue, in said city; that two certain general stipulations, contained in the specifications attached to said contract and made a part thereof, provided as follows:

“Plans and superintendence—This improvement shall be under the superintendence of the city engineer, and any orders or directions given by him, or his duly appointed representative, shall be respected and immediately and strictly obeyed by the contractor or any overseer in charge of the work. It is hereby understood that wherever the term ‘engineer’ or city engineer are mentioned in these specifications, it shall mean himself or any representative duly appointed by him.

“General stipulations — Whenever the contractor is not present on the work, orders will be given to the superintendent or overseer who may have immediate charge thereof, and shall by them be received and strictly obeyed. And if any person employed on the work shall refuse or neglect to obey the directions of the city engineer or board of public works in anything relating to the work, or shall appear to be incompetent, disorderly or unfaithful, he shall, upon the requisition of the engineer, be at once discharged, and not again employed upon any part of the work;”

that appellant, as a laborer, was employed by and working for Ryan & Company, in the performance of said contract; that one John James, a duly authorized representative of the city engineer, on November 16, 1901, while

appellant was digging sand to be used by said Ryan & Company in said work, instructed appellant to dig a better quality of sand in another location, where he would be under the roots of a massive stump, about six feet in diameter, and extending three feet over the place where he so directed appellant to work; that said stump was in constant danger of falling; that appellant did not know of said danger; that, while he was working where so directed, said stump did fall upon him, causing the injuries complained of. It appears that the sand pit where appellant was working and injured was not on or at Second avenue, but on Mercer street, an ungraded street, where, with the consent of the city, said Ryan & Company were obtaining sand to be used by them in said improvements. Upon trial before a jury, the trial court granted a nonsuit, and entered judgment for respondent. From said judgment, this appeal has been taken.

The theory upon which appellant bases his right of recovery is that the relation of master and servant existed between said city and himself, a relation imposing upon the city the duty to furnish him a reasonably safe place to work. On the other hand, respondent contends that Ryan & Company were independent contractors; that appellant was their employee, hired and compensated by them, and that, by reason thereof, no relation of master and servant existed between respondent and appellant. Insisting that said relation did exist, appellant contends that the city engineer had the right to superintend the work, to direct and discharge employees; and therefore that Ryan & Company were not independent contractors, within the rule exempting employers from liability for injury caused by negligence in the prosecution of the work; and cites, *Seattle v. Buzby*, 2 Wash. T. 25, 3 Pac. 180, and *Cooper v. Seattle*, 16 Wash 462, 47 Pac. 887, 58 Am. St. 46.

Neither of said cases support appellant's contention. In *Seattle v. Buzby* the question here involved was not discussed. In both cases, property of third parties, not em-

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ployees of the alleged independent contractors, had been injured, as the result of negligence in making certain public improvements. It is true that in *Cooper v. Seattle* the question of independent contractor was discussed to some extent, but such discussion was not necessary to reach the final judgment, which was correct and just. No fault can be found with said final judgment, but the case itself has no bearing here.

Appellant was himself engaged in the work under a contract with Ryan & Company, and while as to third persons who might be injured, or whose property might be damaged, by reason of that work, he became the servant of the city by operation of law, yet, as between the city and himself, he was solely the servant of Ryan & Company, and not of the city. The liability of the city of Seattle to a third party, in both of said cases, existed irrespective of the question of whether or not the work was being done by an independent contractor. All that is decided in *Cooper v. Seattle, supra*, is that there was no independent contractor who sustained such a relation to the work as would release the city, under the general rule, from liability to a third person (not an employee) whose property was injured by reason of failure of the city to see that public work was performed without negligence. The learned judge who wrote the opinion cited, in support of his position, *Seattle v. Buzby, supra*, which we have already discussed, and also *Fink v. St. Louis*, 71 Mo. 52, and *Cincinnati v. Stone*, 5 Ohio St. 38. In *Fink v. St. Louis*, the court uses this language:

"The circuit court which tried the case, therefore, held that whether the city engineer did in fact superintend the work or not, it was his duty under the ordinance and charter to do so, and the city was responsible for any negligence occasioning injury to the proprietors of adjoining lots. And we think this view of the case was right and in harmony with the authorities. The action is not for damages occasioned by the tunnel, but for an excavation for a sewer,

which could only be done by consent of the city and under supervision of the city engineer. The plans for the work were submitted to the city and approved, and whether its officers supervised its execution or not, was of no consequence, since it was their duty to have done so—a duty imposed by the charter and recognized in the ordinance, and with which the state had no concern and did not attempt to interfere.”

In *Cincinnati v. Stone*, the court says:

“In addition to the fact, in this case, that the city of Cincinnati retained the entire control and direction over the work, under the contract, it was a public duty enjoined on the city to remove all nuisances from the streets of the city, and to make no contracts for the improvement of the streets by which any nuisance would be created on the premises of the adjacent proprietors; the city was, therefore, clearly liable for the injury sustained by the negligence of the contractor, or of any of his subordinates in the performance of the work.”

These quotations show the theory on which *Cooper v. Seattle* was really decided.

In *Reilly v. Chicago etc. R. Co.*, 122 Iowa 525, 98 N. W. 464, the supreme court of Iowa, in a case involving the question of independent contractor, speaking of the duty of a master to furnish the servant a safe place in which to work, says:

“The duty of furnishing plaintiff a safe place to work and exercising care and supervision to maintain such condition of safety rested upon the employer alone, and (unless it be under extraordinary circumstances, which do not here obtain) that obligation cannot be extended to include the party for whom the contractor has undertaken to perform the work. . . . This conclusion is not at all inconsistent with the rule of the cases cited by the appellant of which *Hawver v. Whalen*, 49 Ohio 69, 29 N. E. 1049, 14 L. R. A. 828; *Cameron v. Oberlin*, 19 Ind. App. 142, 48 N. E. 386; *Ohio S. R. R. v. Morey*, 47 Ohio 207, 24 N. E. 269, 7 L. R. A. 701; and *Erickson v. R. R.*, 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786, are types. In the

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Hawver case an independent contractor was employed to dig a ditch, which was not properly guarded for the protection of the public having the right to pass that way, and the owner was held liable to a person (not an employee of the contractor) falling into the excavation. The same rule is applied in *Cameron v. Oberlin* and *Ohio S. R. R. v. Morey*. If in these cases the persons injured had been employees of the contractor, and had received their injury in the course of their employment by reason of the negligence of the contractor, we think no one would claim that the municipality, corporation, or other party letting the contract could be held liable in damages. These authorities go no further than to hold that no person or municipality charged by law with the duty of keeping a street or other place in safe condition for public use can escape responsibility for neglect of that duty by showing that an independent contractor is primarily at fault."

In *Covington etc. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. 377, the supreme court of Ohio says:

"The weight of reason and authority is to the effect that, where a party is under a duty to the public, or third person, to see that work he is about to do, or have done, is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another. . . . It is the danger to others, incident to the performance of the work let to contract, that raises the duty, and which the employer cannot shift from himself to another, so as to avoid liability, should injury result to another from negligence in doing the work."

The above quotations state the correct principle in *Cooper v. Seattle, supra*, which case is therefore not controlling here, appellant being an employee of the alleged independent contractors.

If Ryan & Company were independent contractors, the relation of master and servant did not exist between respondent and appellant. Were they such independent contractors? Appellant contends not, because the city engineer,

according to appellant's construction of the above quoted stipulations of the contract, had authority to superintend the work and to direct and discharge employees. We do not think he personally had any right to direct or to discharge. . His orders were to be given to the contractors or, in their absence, to the superintendent or overseer having immediate charge of the work. The engineer had no right to order any individual employees of Ryan & Company to work either here or there. Their orders came from the contractors, superintendent, or overseer. Again, he could not discharge employees; all he could do was to make a requisition for such discharge, under certain conditions. The contract did not contemplate that he should have control of employees. Conceding, however, that the engineer had all the authority contended for by appellant, yet Ryan & Company were independent contractors. They had full control of the mode and manner of doing the work, selected their own materials, and employed and paid their own help; and they represented their employer, the city, as to the results of the work, and not as to the means by which it was to be accomplished.

"Generally speaking, an independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. The word 'results,' however, is used in this connection in the sense of a production or product of some sort, and not of a service. . . . A reservation by the employer of the right by himself or his agent to supervise the work for the purpose merely of determining whether it is being done in conformity to the contract does not affect the independence of the relation."

16 Am. & Eng. Ency. Law (2d ed.), 187-188.

See, also, *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. 672; *Rogers v. Florence R. Co.*, 31 S. C. 378, 9 S. E. 1059; *Erie v. Caulkins*, 85 Pa. St. 247, 27 Am. Rep. 642; *Kelly v. Mayor*, 11 N. Y. 432.

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In *Casement v. Brown*, Justice Brewer says:

"Obviously, the defendants were independent contractors. The plans and specifications were prepared and settled by the railroad companies; the size, form and place of the piers were determined by them, and the defendants contracted to build piers of the prescribed form and size and at the places fixed. They selected their own servants and employees. Their contract was to produce a specified result. They were to furnish all the material and do all the work, and by the use of that material and the means of that work were to produce the completed structures. The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of both material and work. The contract was not to do such work as the engineers should direct, but to furnish suitable material and construct certain specified and described piers, subject to the daily approval of the companies' engineers. This constant right of supervision, and this continuing duty of satisfying the judgment of the engineers, do not alter the fact that it was a contract to do a particular work, and in accordance with plans and specifications already prepared. They did not agree to enter generally into the service of the companies, and do whatsoever their employers called upon them to do, but they contracted for only a specific work. The functions of the engineers were to see that they complied with this contract—'only this, and nothing more.' They were to see that the thing produced and the result obtained were such as the contract provided for. *Carman v. Steubenville & Indiana Railroad Company*, 4 Ohio St. 399, 414; *Corbin v. American Mills*, 27 Conn. 274; Wood on Master and Servant, 610, § 314."

The above authorities, and many others which might be cited, support the conclusion that Ryan & Company were not removed from the category of independent contractors by reason of the right of superintendence in the city en-

gineer. On the other hand, conceding to him the right to discharge employees of Ryan & Company, still they were independent contractors. *Rogers v. Florence R. Co.*, *supra*; *Hobbit v. London etc. R. Co.*, 4 Exch. 253; *Cuff v. Newark etc. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205. In *Hobbit v. London etc. R. Co.*, the court says:

“Our attention was directed during the argument to the provisions of the contract, whereby the defendants [the Railway Company] had the power of insisting on the removal of careless or incompetent workmen, and so it was contended they must be responsible for their non-removal. But this power of removal does not seem to us to vary the case. The workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal if they thought him careless or unskilful, did not make him their servant.”

Under the above authorities, we are clearly of the opinion that Ryan & Company, were as to this appellant, independent contractors, and that the relation of master and servant existed between them and appellant, instead of existing between respondent and appellant. This being true, the doctrine of *respondeat superior* cannot be applied to respondent, and it is not liable to appellant in this action. We find no error in the record. The judgment is affirmed.

MOUNT, C. J., RUDKIN, HADLEY, and DUNBAR, JJ., concur.

Root, J., being disqualified, took no part.

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Statement of Case.

[No. 5550. Decided September 9, 1905.]

LEANNA M. HEMEN, *Administratrix of the Estate of F. P. Hemen, Deceased, Appellant*, v. THE CITY OF BALLARD, *Respondent*.¹

LIMITATION OF ACTIONS—DIVERSION OF SPECIAL FUND FOR LOCAL IMPROVEMENTS — PAYMENT OF LATER WARRANTS — ACTUAL AND CONSTRUCTIVE NOTICE—ACCRUAL OF ACTION. The right of action against a city for the wrongful diversion of a special fund, provided for the payment of warrants, does not accrue until the holder of the warrant has actual notice of the diversion, constructive notice by the public record of payment of subsequent warrants not being sufficient to start the running of the statute (FULLERTON, J., dissenting).

MUNICIPAL CORPORATIONS—SPECIAL FUND FOR LOCAL IMPROVEMENT —WRONGFUL DIVERSION BY CITY—WARRANTS—PAYMENT OUT OF ORDER OF PRIORITY. A city renders itself liable to the holder of special fund street improvement warrants by paying subsequent warrants out of the order of their priority, where the fund was insufficient in amount to pay all the warrants issued against it, and nothing was left to pay the prior warrants.

SAME—IMPROVEMENTS AT CROSSING ASSESSABLE TO CITY—SAME A PART OF SPECIAL ASSESSMENT FUND. Under Bal Code, § 943, making the city liable for the cost of street improvements at street intersections and crossings, such cost, where an entire contract is made for the whole improvement, is to be paid by the city into the special fund for the benefit of special fund warrants to be paid in the order of their priority, and the payment of the city's share of the cost, by its general fund or street fund warrants out of their order, is a wrongful diversion, operating to the prejudice of the holders of special fund warrants, where the special assessment including the city's share is insufficient to pay the entire cost of the improvement.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 1, 1904, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action against a city for the wrongful diversion of a special fund for local improvements. Reversed.

¹Reported in 82 Pac. 277.

Ballinger, Ronald & Battle and *A. J. Tennant*, for appellant.

M. H. Ingersoll, for respondent.

CROW, J.—In the year 1890 the city of Ballard, by proper proceedings, improved Ballard avenue, created an assessment district, and afterwards levied a special assessment on all property in said district, thereby creating a special fund to pay for said improvement. A contract was let to one Thadeus Comfort for the total sum of \$13,585.99, which was to be paid by warrants issued against said special fund. Under Bal. Code, § 943, the expense of said improvement at street crossings and intersections became a liability of the city, which in this instance amounted to \$982.43. The total assessment made on property in the special district was \$11,982.77, which, with said sum of \$982.43, made a special fund of \$12,965.20, not sufficient to pay the full contract price. No objection to the insufficient amount of said assessment has ever been made by any of the parties interested. The entire assessment made has been collected by the city.

Said improvement was fully completed by the contractor, and the city issued warrants to him numbered 1 to 79, inclusive, drawn on said Ballard avenue street improvement fund, for the total amount of \$13,585.99, the entire contract price. F. P. Hemen purchased warrants 70, 71, and 72, each for \$200, from said contractor, and owned the same at the time of the commencement of this action. Said warrants were identical in form and amount, No. 70 reading as follows:

“No. 70. Street Improvement Warrant, \$200.00.

“Ballard, Wash., November 12th, 1890.

“Treasurer of the Town of Ballard:

“Pay to Thadeus Comfort, or bearer, the sum of two hundred dollars out of the Ballard Avenue Street Improvement Funds, under Ordinance No. 12, not otherwise appropriated.

“Chas. Hadfield, Town Clerk. C. F. Treat, Mayor.”

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All warrants prior to No. 70 were fully paid from said special fund, and \$291.91 was, on June 23, 1903, paid on the amount of principal and interest due on said No. 70. No payments have been made on 71 or 72, although demanded. On September 3, 1891, the city of Ballard took up warrants 73 to 77, inclusive, later than those held by Mr. Hemen, and paid or cancelled the same by issuing a warrant on its general fund, for the principal and interest due thereon; and, on January 11, 1892, said city also took up warrants 78 and 79, later than those held by Mr. Hemen, and paid or cancelled them by issuing a warrant on its street fund, for the principal and interest due thereon. The total principal amount of said special fund warrants 73 to 79, so taken up, was \$982.43, being the sum for which said city was liable for the expense of said improvement at street crossings and intersections.

F. P. Hemen, as holder and owner of said prior warrants Nos. 71 and 72, claiming that said later warrants had been paid by said city with money that belonged to said special Ballard avenue fund, and that his warrants should have been first paid, commenced this action to recover damages sustained by him resulting from the wrongful action of respondent in first making payment of said subsequent warrants. The city pleaded the statute of limitations, to which affirmative answer the said F. P. Hemen replied by alleging that he had no knowledge of the misappropriation of moneys belonging to said special fund, until within three years prior to the commencement of this action. Upon the evidence, the trial court found this allegation to be true, but also found that all the above transactions were matters of public record from and after the time of their occurrence, and that said Hemen had constructive notice thereof.

Trial was had without a jury, and the court made findings by which the facts above stated were ascertained and determined. No exceptions were taken to said findings, the same having been accepted by both parties. Upon said find-

ings, the court made conclusions of law, and entered judgment dismissing the action. After the final judgment had been entered, the death of said F. P. Hemen was suggested, and upon stipulation Leanna M. Hemen, his administratrix, was substituted as party plaintiff, and now prosecutes this appeal.

Only two questions arise for our consideration: (1) Has the action been barred by the statute of limitations? (2) Is appellant entitled to recover on the facts found? We do not think the action has been barred. The trial court found affirmatively that said F. P. Hemen had not, at any time within three years prior to the commencement of this action, any actual notice or knowledge of the action of the city in taking up said later warrants. Under the authority of *New York Security & Trust Co. v. Tacoma*, 30 Wash. 661, 71 Pac. 194, and *Northwestern Lumber Co. v. Aberdeen*, 35 Wash. 636, 77 Pac. 1063, this action was commenced in time.

If respondent, in taking up said later warrants Nos. 73 to 79, disbursed money belonging to said special Ballard avenue fund, and in so doing paid warrants later than those held by appellant, and if, after payment of all warrants prior to those held by appellant, said money would have been sufficient in amount to have paid appellant's warrants, and if no money now remains in said special fund to pay appellant, then, under the holdings of this court, respondent would in this action be liable to appellant for damages sustained. *New York Security & Trust Co. v. Tacoma, supra*; *Northwestern Lumber Co. v. Aberdeen, supra*; *Potter v. New Whatcom*, 20 Wash. 589, 56 Pac. 394, 72 Am. St. 135; *North Western Lumber Co. v. Aberdeen*, 22 Wash. 404, 60 Pac. 1115. Most of said cases also hold that warrants drawn on a special fund should be paid in the order of their priority. See, also, *La France Fire Engine Co. v. Davis*, 9 Wash. 600, 38 Pac. 154; *Bardsley v. Sternberg*, 18 Wash. 612, 52 Pac. 251, 524.

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The facts show that there was enough money to pay all warrants prior to those held by appellant, and to make a partial payment on No. 70 held by him, but that no further funds now remain to pay any additional sum on his three warrants. The vital question, therefore, which we are called upon to decide is, whether said \$982.43, which was to be paid by said city on account of the expense of said improvement at street crossings or intersections, was or was not a part of said special Ballard avenue street improvement fund. If it was, appellant is entitled to recover; if not, this action was properly dismissed.

In Bal. Code, § 943, which provides the method of making street improvements, creating assessment districts, and levying special assessments, we find the following language:

“The expense of all improvements in the space formed by the junction of two or more streets, or where one main street terminates in or crosses another main street, and also all necessary street crossings or crossways at corners or intersections of streets . . . shall be paid by such city.”

The record shows that one entire contract was let to Thadeus Comfort to make the complete improvement, including crossings, street intersections, etc. The contract price was \$13,585.99, which necessarily included the \$982.43, for which the city was liable. The contractor was to be paid only in warrants issued from time to time on said special Ballard avenue fund. Seventy-nine warrants in all were issued to said contractor on said special fund, for the full contract price of \$13,585.99. This method of business, adopted by the contractor and the city, clearly shows their construction of the contract to be that said contractor was to be paid out of said special fund for all the work including that portion for which the city was liable. This construction appears from the form and wording of the warrants themselves.

Our conclusion is that only one fund was contemplated, and that, after the seventy-nine special warrants had been

issued, the city was indebted to the special Ballard avenue street improvement fund just the same as any property within the district that had been assessed. When the assessments on said property were collected, they became a part of, and went into, said special fund, and we think an obligation rested on the city to pay its \$982.43 into the same fund in the same manner that property assessed in the district was indebted therefor. This was certainly the orderly, proper, and businesslike method of proceeding, and had it been done, the city would have applied all the money in said special fund to the payment of said special warrants in the order of their priority, and appellant's warrants would have been fully paid. Instead of doing this, respondent issued warrants on its general fund and street fund, and instead of paying their proceeds into the special fund, used the same to take up special warrants 73 to 79, leaving appellant's prior warrants without any means of payment.

In argument, respondent refers to this transaction as a cancellation of an excess of warrants which had been improperly issued against the special fund. We think, however, that its legal effect was a payment of said special fund warrants with money which rightfully belonged to said special fund and should have been placed therein. Seventy-nine warrants had been issued in payment of \$13,585.99, the full contract price. The only money that could become available to pay said seventy-nine warrants in their order was the special assessment coming from property in the district, and the money due from the city for its share of the contract, and the total special fund thus created should have been paid on the special fund warrants in their order. Holding, as we do, that said \$982.43 was legally and rightfully a part of said special fund, and should have been transferred to and paid into it, and the city, having failed to pay the special warrants in proper order, to the prejudice and damage of appellant, we are of opinion that appellant is entitled to recover.

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Syllabus.

The judgment of the superior court is reversed, and the cause remanded with instructions to enter judgment for appellant.

MOUNT, C. J., ROOT, HADLEY, and DUNBAR, JJ., concur.

FULLERTON, J. (dissenting)—I am of the opinion that the appellant's right of action was barred by the statute of limitations, and I dissent from the conclusion reached by the majority.

[No. 5704. Decided September 9, 1905.]

THE UNITED STATES, *for the Use of Standard Furniture Company, Respondent*, v. AETNA INDEMNITY COMPANY, *Appellant*.¹

STATUTES—U. S. STATUTES REQUIRING BOND OF CONTRACTOR ON PUBLIC WORK—CONSTRUCTION—PROTECTION OF MATERIALMEN. The act of Aug. 13, 1894, 28 Stat. 278, requiring a bond of contractors on public work, is to be liberally construed, and in the case of a contract to build and furnish light-house keepers' residences, extends to parties who supplied the contractor with furniture, although the same does not become a part of the permanent structure.

INDEMNITY—GUARANTEEING FEDERAL CONTRACT—BOND CONDITIONED TO PERFORM CONTRACT AND PAY FOR LABOR AND MATERIAL—CONSTRUCTION—SUPPLYING FURNITURE REQUIRED BY CONTRACT—ACTION ON BOND BY MATERIALMEN. An action upon a bond guaranteeing the performance of a Federal contract may be maintained in the name of the United States for the benefit of one who has furnished the contractor with furniture required in the contract, whether or not the same is contemplated by 28 Stat. 278, requiring bonds on public work for the benefit of materialmen and laborers.

INDEMNITY—PRINCIPAL AND SURETY—EXTENSION OF TIME FOR PAYMENT—DISCHARGE OF SURETY. A compensated surety company guaranteeing the performance of a contractor's bond is not discharged by extending the time for payment by the contractor.

¹Reported in 82 Pac. 171.

SAME — TRIAL — EVIDENCE—PROOF OF INDULGENCE AND UNUSUAL CREDIT TO CONTRACTOR—ADMISSIBILITY. An unusual indulgence and extension of time to a contractor, operating to the prejudice of a surety, cannot be shown to discharge the surety, when it is not pleaded.

PLEADING—AMENDMENT. Where a demurrer to a defense has been sustained, and no amendment is offered until the trial, it is not an abuse of discretion to refuse to allow a trial amendment, when the adverse party makes a claim of surprise.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 5, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a contractor's bond. Affirmed.

Graves, Palmer, Brown & Murphy, for appellant, contended, among other things, that the bond should be construed as giving the same relief as furnished by mechanics' liens on private structures. *Ihrig v. Scott*, 5 Wash. 584, 32 Pac. 466; *United States, use Vermont Marble Co. v. Burgdorf*, 13 App. D. C. 506; *Wells & Co. v. Mehl*, 25 Kan. 205; *United States, use Standard Oil Co. v. City Trust etc. Co.*, 21 App. D. C. 369; *Basshor v. Baltimore etc. R. Co.*, 65 Md. 99, 3 Atl. 285; *United States, use Thomas Laughlin Co. v. Morgan*, 111 Fed. 474; *Thomas Laughlin Co. v. American Surety Co.*, 114 Fed. 627; *United States, use Sabine etc. R. Co. v. Hyatt*, 92 Fed. 442; *United States, use of Sica v. Kimpland*, 93 Fed. 403; *American Surety Co. v. Lawrenceville Cement Co.*, 110 Fed. 717; *United States v. Simon*, 98 Fed. 73; *Central Trust Co. v. Texas etc. R. Co.*, 27 Fed. 178; *Vendome Turkish Bath Co. v. Schettler*, 2 Wash. 457, 27 Pac. 76; *Armour & Co. v. Western Const. Co.*, 36 Wash. 529, 78 Pac. 1106.

Richard Saxe Jones, for respondent.

CROW, J.—On April 2, 1902, R. M. Henningsen and Thorvald Olsen, copartners under the firm name and style

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of R. M. Henningsen & Co., entered into a written contract with W. C. Langfitt, Captain corps of engineers, United States army, engineer of the Thirteenth lighthouse district, for and on behalf of the United States, for the construction, equipment, and furnishing of a certain lighthouse, and two keepers' residences, for the Mary Island lighthouse station of Alaska. The written specifications attached to said contract and made a part thereof expressly required that said contractors should furnish certain furniture for said keepers' residences.

Under the provisions of the act of Congress of August 13, 1894, chapter 280, 28 Stat. 278, the United States government required, and the said contractors furnished, a penal bond in the sum of \$20,000, executed by appellant, the Aetna Indemnity Company, as surety, conditioned that said Henningsen & Co. should fully perform said contract and promptly make payments to all persons supplying them with labor and materials in the prosecution of the work therein provided for. Said Henningsen & Co., in the performance of said contract, purchased from respondent, the Standard Furniture Company, certain furniture called for in said stipulations, to the total value of \$693, on which they made a partial payment of \$400. No further payment being made, this action against said Henningsen & Co. and appellant, the Aetna Indemnity Company, was brought on said bond, to recover \$293 remaining due. Appellant, the Aetna Indemnity Company, in its answer, pleaded the following affirmative defenses:

"(1) For a first further and affirmative defense, this defendant alleges that the goods, wares, and merchandise alleged to have been furnished by the plaintiff were not such goods and merchandise as went into the construction of the buildings, and were not labor and material, within the meaning of the statute, as would entitle this action to be brought in the name of the United States.

"(2) For a second and further affirmative defense, this defendant alleges that the goods, wares, and merchandise alleged to have been furnished to the defendant, R. M. Hen-

ningsen & Co., were furnished on or about the 17th day of April, 1903, and that the time for payment thereof by the defendant, R. M. Henningsen & Co., was extended without the knowledge or consent of this surety, and to its detriment."

To these defenses, respondent interposed separate demurrers, which the court overruled as to the first but sustained as to the second. Respondent by its reply denied the allegations of said first affirmative defense. Upon trial, findings of fact and conclusions of law were made, and judgment was entered thereon in favor of respondent. From said judgment, this appeal has been taken.

Appellant's first contention is that the materials furnished, being personal property and not having entered into the permanent structures, were not such materials as would give plaintiff a right of action in the name of the United States, under said act of Congress, on the bond in question; and that the trial court therefore erred in refusing to grant appellants motion to dismiss, made at the opening of the case, upon the ground that the complaint did not state facts sufficient to constitute a cause of action; and also erred in refusing a nonsuit. Appellant, in support of the proposition, urges that the object of the act of August 13, 1894, 28 Stat. 278, was to give the same relief by a proceeding upon the bond of a public contractor that could be had by foreclosure of a mechanic's or materialman's lien on a building erected by a private owner, claiming such purpose to have been the evident intent of Congress, and that said statute should receive such construction at the hands of the court. Appellant has cited numerous authorities for the purpose of sustaining its contention that this statute was intended to afford relief to such parties as would ordinarily be entitled to a mechanic's or materialman's lien under statutes of the various states, were the buildings private instead of public. There is no question but that said statute affords such relief to the subcontractors, laborers, and materialmen;

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but a remedy for other parties dealing with the contractor is also afforded. The statute in question reads as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the Department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution; *Provided*, That such action and its prosecutions shall involve the United States in no expense." 28 Stat. 278, c. 280, § 1.

This act should be liberally construed, and from its wording we are of the opinion that, not only are claims of the character suggested by the appellant protected by the bond therein mentioned, but persons furnishing any materials in the prosecution of the work provided for are also protected thereby, even though such materials do not enter into, or become a part of, any permanent structure. The United States circuit court for the district of Maine, in *American Surety Co. v. Lawrenceville Cement Co.*, 110 Fed. 717, at page 719, says:

"In using the expression which we have quoted from the statute and the bond, there can be no question that Congress had somewhat in mind statutes in various states giv-

ing liens on buildings and other property, real and personal, for labor and material. Nevertheless, this statute does not have the same aspect as the ordinary lien statutes referred to, and therefore the latter can afford only very general assistance with reference to the construction of the former. The ordinary lien statutes have been justly and strictly held to cover only what has added to the value of the property against which the lien is asserted, and therefore they are ordinarily administered to protect only what is actually incorporated into its substance. . . . The underlying equity of the lien statutes relates to a direct addition to the substance of the subject-matter of the building, or other thing, to which the lien attaches, while the statute in question concerns every approximate relation of the contractor to that which he has contracted to do. Plainly, the act of Congress and the bond in the case at bar are susceptible of a more liberal construction than the lien statutes referred to, and they should receive it. In the one case, as in the other, the dealings of the person who claims the statutory security must approximate the work, and in the one case as well as in the other there must be a certain margin within which there will be difficulties in discriminating between what is and what is not protected. Nevertheless, we are not concluded by the decisions with reference to the ordinary state statutory liens. We can apply them only in a general way, and we are not so restricted by them as to require a construction inconsistent with the remedial purposes of the statute now in issue."

See, also, *United States to Use of Tidewater Steel Co. v. Perth Amboy Shipbuilding etc. Co.*, 137 Fed. 689. Under the construction given to said act by the above authorities, which we feel obliged to follow, there can be no question but that respondent was entitled to recover on said bond for the furniture which it sold to said contractors in pursuance of the terms and stipulations of said contract.

But were it to be conceded that said furniture was not contemplated by the statute, it was clearly required by the contract, being a part of its subject-matter. The bond was given to secure the faithful performance of said contract and payment to all parties furnishing any material there-

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under. Appellant under its contract should be held liable, without regard to any statute, as it has by said bond contracted to assume such liability, and there is nothing in said agreement contrary to public policy, nor can any objection be made to it or its terms requiring it to be held invalid. In *United States to Use of Tidewater Steel Co. v. Perth Amboy Shipbuilding etc. Co.*, *supra*, the United States circuit court for the district of New Jersey, construing said statute and also a bond given thereunder, said:

“Waiving, however, the general character of this last reason, we will for a moment consider the point made under it, that the act of Congress (Act Aug. 13, 1894, c. 280, § 1, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523]) gives a right of action only to persons supplying labor and materials ‘for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building, or public work,’ which provision does not include steamers for the harbor service of the quartermaster’s department; and counsel cites in support of his proposition definitions of ‘public works’ from the Century Dictionary and the Am. & Eng. Ency. of Law (2d ed.). Without quarreling with these definitions, we conclude that the meaning of the words ‘public work’ in the act is broader and more comprehensive than the dictionary meaning given to ‘public works’; that public work is susceptible of application to any constructive work of a public character, and is not limited to fixed works. The statute should be liberally construed to accomplish its purpose. But without further discussion of the point, it is quite sufficient to say that, whether the foregoing view is correct or not, the defendants are estopped from setting up such defense; they executed the bond well knowing its intent and purpose, and, since the purpose was not immoral or illegal, they cannot now be heard to deny their liability, voluntarily assumed and undertaken.”

We are satisfied that the recovery had by respondents in this action was contemplated by said statute and also by said bond.

Appellant further contends that the court erred in sus-

taining respondent's demurrer to its second affirmative defense. Under authority of *United States Fidelity etc. Co. v. United States*, 191 U. S. 416, 48 L. Ed. 242, we think said demurrer was properly sustained. Appellant also contends that the court erred in sustaining respondent's objection to evidence offered tending to show that, without appellant's knowledge or consent, respondent had granted a certain indulgence and an unusual extension of credit to the contractors Henningsen & Co., and that, if said indulgence had not been granted, Henningsen & Co. would have been able to have responded, or appellant could have indemnified itself. We think said evidence was not admissible under the issues. A demurrer had been properly sustained to the second affirmative defense, and appellant made no attempt to amend at any time prior to the trial. It is true that during the trial appellant requested permission to amend its answer, which request, upon the claim of surprise made by respondent, was refused; but such refusal was not an abuse of discretion.

We find no prejudicial error in the record. The judgment is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, and DUNBAR, JJ., concur.

Root, J., having been of counsel, took no part.

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Citations of Counsel.

[No. 5636. Decided September 11, 1905.]

THE STATE OF WASHINGTON, *on the Relation of the City of
Port Townsend, Plaintiff*, v. C. W. CLAUSEN, *as
Auditor of the State of Washington,
Respondent.*¹

SCHOOLS—PERMANENT SCHOOL FUND—INVESTMENT—PROPRIETY OR SAFETY — DETERMINATION OF STATE LAND COMMISSIONERS. The determination of the board of state land commissioners as to the propriety and safety in investing the permanent school fund is conclusive on the state auditor and on the courts, when not impeached for bad faith or fraud.

STATES—FINANCIAL MANAGEMENT — INVESTMENT OF PERMANENT SCHOOL FUND—MUNICIPAL BONDS—DEFINITION—CITY BONDS PAYABLE OUT OF SPECIAL FUND—CREATED BY RECEIPTS OF WATER WORKS SYSTEM—GENERAL CREDIT OF CITY NOT PLEDGED. Bonds issued by a city under Laws 1901, p. 177, to defray the cost of the construction of waterworks, which are payable only out of a special fund derived from the revenues of the waterworks system, and for which the city is not in any way liable, are not municipal bonds within the meaning of Const., art. 16, § 5, authorizing the investment of the permanent school fund in municipal bonds, as such provision contemplates the protection of the permanent school fund by investment in bonds secured by a pledge of the credit of the municipality.

Application filed in the supreme court April 18, 1905, for a writ of mandamus to compel the state auditor to issue a warrant on the permanent school fund of the state in payment for bonds accepted as an investment by the board of state land commissioners. Writ denied.

Coleman & Ballinger, Vance & Mitchell, and G. M. Emory, for relator, upon the point that "non-liability" bonds are municipal bonds within the meaning of the constitution, cited: *United States v. Ft. Scott*, 99 U. S. 152, 25 L. Ed. 348; *United States v. County of Macon*, 99 U. S. 582, 25 L. Ed. 331; *Bates v. Gerber*, 82 Cal. 550, 22 Pac. 1115;

¹Reported in 82 Pac. 187.

issued, the city was indebted to the special Ballard avenue street improvement fund just the same as any property within the district that had been assessed. When the assessments on said property were collected, they became a part of, and went into, said special fund, and we think an obligation rested on the city to pay its \$982.43 into the same fund in the same manner that property assessed in the district was indebted therefor. This was certainly the orderly, proper, and businesslike method of proceeding, and had it been done, the city would have applied all the money in said special fund to the payment of said special warrants in the order of their priority, and appellant's warrants would have been fully paid. Instead of doing this, respondent issued warrants on its general fund and street fund, and instead of paying their proceeds into the special fund, used the same to take up special warrants 73 to 79, leaving appellant's prior warrants without any means of payment.

In argument, respondent refers to this transaction as a cancellation of an excess of warrants which had been improperly issued against the special fund. We think, however, that its legal effect was a payment of said special fund warrants with money which rightfully belonged to said special fund and should have been placed therein. Seventy-nine warrants had been issued in payment of \$13,585.99, the full contract price. The only money that could become available to pay said seventy-nine warrants in their order was the special assessment coming from property in the district, and the money due from the city for its share of the contract, and the total special fund thus created should have been paid on the special fund warrants in their order. Holding, as we do, that said \$982.43 was legally and rightfully a part of said special fund, and should have been transferred to and paid into it, and the city, having failed to pay the special warrants in proper order, to the prejudice and damage of appellant, we are of opinion that appellant is entitled to recover.

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Syllabus.

The judgment of the superior court is reversed, and the cause remanded with instructions to enter judgment for appellant.

MOUNT, C. J., ROOT, HADLEY, and DUNBAR, JJ., concur.

FULLERTON, J. (dissenting)—I am of the opinion that the appellant's right of action was barred by the statute of limitations, and I dissent from the conclusion reached by the majority.

[No. 5704. Decided September 9, 1905.]

THE UNITED STATES, *for the Use of Standard Furniture Company, Respondent*, v. AETNA INDEMNITY COMPANY, *Appellant*.¹

STATUTES—U. S. STATUTES REQUIRING BOND OF CONTRACTOR ON PUBLIC WORK—CONSTRUCTION—PROTECTION OF MATERIALMEN. The act of Aug. 13, 1894, 28 Stat. 278, requiring a bond of contractors on public work, is to be liberally construed, and in the case of a contract to build and furnish light-house keepers' residences, extends to parties who supplied the contractor with furniture, although the same does not become a part of the permanent structure.

INDEMNITY—GUARANTEEING FEDERAL CONTRACT—BOND CONDITIONED TO PERFORM CONTRACT AND PAY FOR LABOR AND MATERIAL—CONSTRUCTION—SUPPLYING FURNITURE REQUIRED BY CONTRACT—ACTION ON BOND BY MATERIALMEN. An action upon a bond guaranteeing the performance of a Federal contract may be maintained in the name of the United States for the benefit of one who has furnished the contractor with furniture required in the contract, whether or not the same is contemplated by 28 Stat. 278, requiring bonds on public work for the benefit of materialmen and laborers.

INDEMNITY—PRINCIPAL AND SURETY—EXTENSION OF TIME FOR PAYMENT—DISCHARGE OF SURETY. A compensated surety company guaranteeing the performance of a contractor's bond is not discharged by extending the time for payment by the contractor.

¹Reported in 82 Pac. 171.

city or town treasurer in the order of their numbers whenever there is in such special fund, after payment of interest on all outstanding bonds or warrants, a sufficient balance to pay the same. And any such bonds or warrants issued against any special fund as herein provided shall be a valid claim of the holder thereof only as against the said special fund, and the fixed proportion of special revenues obligated to be set aside therein, and shall not constitute an indebtedness of such city or town within the meaning of the constitutional provisions and limitations. The principal and interest of any such bonds or warrants shall be made payable at such place as may be designated. Each such bond or warrant shall state upon its face that it is payable from a special fund, naming the said fund and the ordinance creating it. Said bonds or warrants shall be printed, or engraved or lithographed on good bond paper, and a duly authenticated copy of this act, together with the whole or a summary of the ordinances of the city or town authorizing and directing the submission of such plan or system to the qualified voters of such city or town for ratification or rejection, and creating the special fund, shall be printed on each such bond or warrant, together with a printed copy of a signed statement by the mayor and clerks showing the result of such election. Said bonds or warrants shall be sold in such manner as the corporate authorities shall deem for the best interest of the city or town, or the corporate authorities may provide in any contract for the construction or acquirement of the proposed improvement that payment therefor shall be made only in such bonds and warrants at par value thereof. A register shall be kept of all bonds and warrants, which register shall show the number, date, amount, interest, name of payee and where payable, of each and every bond or warrant issued or sold under the provisions of this subdivision. Upon the creation of any such special fund and the issuance of any such obligation against the same, the fixed proportion of revenue shall be set aside and paid into said special fund as provided in the ordinance creating said fund, and in case any city or town shall fail to thus set aside and pay such fixed proportion as aforesaid, the holder of any bond or warrant against such special fund may bring suit or action against the city or town and compel such setting aside and payment." Laws 1901, p. 179.

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Opinion Per FULLERTON, J.

Acting under and in pursuance of this statute, the city of Port Townsend, on February 16, 1904, duly passed an ordinance adopting a system and plan for supplying "the city and its inhabitants, Fort Warden and Fort Flagler, and other persons, within and without the city, with water, declaring the estimated cost thereof, and creating an indebtedness in the sum of two hundred and fifty thousand dollars." The ordinance provided for the creation of a fund, called therein "The Olympic Gravity Water Works Fund of Port Townsend," into which it was proposed to pay seventy-five per centum of the gross receipts of the water works plant, when completed, and such further sum as the city of Port Townsend should, from time to time, by ordinance, transfer from the receipts of the plant or from its general revenues.

For the purpose of acquiring funds to construct the works, it was proposed by the ordinance to issue bonds against, and payable solely out of, this special fund, in the sum of two hundred and fifty thousand dollars, in denominations as fixed by the statute, and payable at the call of the city treasurer, the same to bear interest not to exceed six per centum per annum, payable semi-annually; such bonds to be sold in such manner and at such rate of interest, not exceeding six per centum, as the city council should deem to the best interest of the city. In short, it was the purpose of the city authorities to provide for the construction of a system of water works for the benefit of the city, and to pay for the same out of a special fund, derived from the revenues of the system when completed, in accordance with the terms of the statute above cited.

The plan proposed by the ordinance was thereafter submitted to the qualified electors of the city of Port Townsend, and was ratified and adopted by the requisite majorities of the electors voting at such election. Bonds were subsequently issued pursuant to this authorization, and on March 20, 1905, the proper city authorities of the city of Port Townsend tendered the bonds to the state of Wash-

ington, as an investment for its permanent school fund. The board of state land commissioners, in whom the statute vests the power to invest this fund, accepted the tender, and by resolution as by law required, directed that the entire issue be purchased at the par value thereof; and that one hundred and fifty thousand dollars of the amount of such purchase be taken and paid for immediately, and the balance within six months from that date. The city thereupon tendered the bonds to the state auditor, and demanded that he issue to it a warrant on the state treasurer, for the sum of one hundred and fifty thousand dollars. The auditor refused to issue the warrant, and these proceedings were instituted to compel him so to do.

The auditor, in his return to the alternative writ, bases his refusal to issue the warrant on several grounds, the principal one, and the only one we have found it necessary to consider, being that the attempted investment is in violation of art. 16, § 5, of the state constitution, which, as amended in 1894, provides that "none of the permanent school fund of this state shall ever be loaned to private persons or corporations, but it may be invested in national, state, county, municipal or school district bonds."

Before proceeding to a notice of the questions argued, however, it is well to state that the contention of the auditor to be here considered raises no question as to the propriety or safety of the proposed investment, and that no such question will be discussed. The authority to determine whether a proposed investment of the permanent school fund is proper or safe is vested by law in the board of state land commissioners, and the determination of that board, unless impeached for bad faith or fraud, is conclusive alike upon the auditor and the courts, no matter how strongly he or they may be convinced of the unwisdom of the board's action. It may be properly stated here, also, that it is set forth in the return of the auditor, and it stands conceded in the record, that the city of Port Townsend was, at the time it

caused the bonds in question to be issued, indebted to the full limit fixed by the constitution, and was without power to incur a further valid general indebtedness, unless, perhaps, for the purchase of actual necessities.

The first question discussed by the parties relates to the nature of the prohibition contained in this section of the constitution. The relator contends that it was intended to mark a distinction between public and private securities, and forbid the investment of the fund in private securities only, leaving the board free to make investments in any form of public securities that they, in the exercise of their discretion, might select. The auditor, on the other hand, contends that the section in question not only prohibits the investment of this fund in private securities but also defines the character of public securities in which it may be invested, and prohibits its investment in any other.

It seems to us that the auditor's contention is the correct one. While a constitution, like any other written instrument, is entitled to a construction in accordance with the intent of its makers, its language, more than that of any other written instrument, is to be taken in its natural and popular sense. Its makers are the people who adopt it. Its language is their language. And when words, phrases, or sentences are used which have both a technical and popular meaning, the former must give way to the latter, unless, of course, the very nature of the subject indicates, or the context suggests, that they are used in their technical senses. Giving the language of this section its natural and popular meaning, it seems to us that it contains both a prohibition and a limitation. It prohibits the loaning of the permanent school fund to private persons and corporations, and limits the securities in which it may be invested to the bonds of the several municipalities therein enumerated.

It may be true, as the relator argues, that, if the last clause of the sentence composing the section is to be held to limit the securities in which the fund may be invested,

it contains in itself a prohibition against loaning it to private persons or corporations, and the first clause would be rendered useless. But the same argument can be made against the relator's contention. If it be true that the purpose was to prohibit the loaning of the fund to private persons and corporations, that purpose is expressed by the first clause of the section, and the latter is superfluous. No solution of this difficulty is found, therefore, in adopting this line of reasoning. The truth is that the natural meaning of the one clause trenches upon the natural meaning of the other, that the clauses are in a certain sense tautological, and this fact must be recognized while endeavoring to arrive at their true meaning. Recognizing this fact, and giving effect to the whole of each clause, the natural and obvious conclusion is that it prohibits the loaning of the fund to private persons and corporations, and limits the public securities in which it may be invested to national, state, county, municipal, and school district bonds.

But the relator says that the case of *State ex rel. School District No. 24, v. Grimes*, 7 Wash. 270, 34 Pac. 836, is contrary to this conclusion. We do not so understand it. While the court held in that case, passing on this section of the constitution prior to the amendment of 1894, that the term "municipal bonds" as used therein included school district bonds, it did not deny that the clause defining the securities in which the permanent school fund might be invested was a limitation upon the power to invest the fund. On the contrary, it expressly stated that this clause was a limitation upon that power, confessing at the same time that such a construction rendered the special prohibition in a measure useless. But if this case left the question uncertain in that regard, it was set at rest by the subsequent case of *State ex rel. Hellar v. Young*, 21 Wash. 391, 58 Pac. 220. There the question was squarely presented whether the legislature could authorize the investment of the permanent school fund in public securities other than

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those enumerated in the section of the constitution now under consideration. It was held that it could not, and that a statute authorizing its investment in state warrants was unconstitutional and void.

The relator contends further that, if it is held that the constitution has limited the securities in which the permanent school fund may be invested to national, state, county, municipal, and school district bonds, these bonds are "municipal bonds" within that limitation. It is said, that the supplying of water to the inhabitants of a municipality, for domestic and other purposes is within the general powers of the municipality, it is a public purpose, and obligations created for that purpose are of necessity public and municipal obligations, no matter whether the provisions made for paying them binds the municipality generally, or binds only some special fund created by the municipality for that purpose; and that when these obligations take the form of bonds they are of necessity municipal bonds. But, if it be true at all that bonds issued by a municipality, which are payable out of a special fund created for that purpose, are municipal bonds, it is true only in a limited and qualified sense; they are such merely because the municipality is instrumental in procuring their issuance, not because they constitute obligations of the municipality. The question before us, however, is much narrower than this line of reasoning would indicate. The question is not whether bonds of this special and limited character may properly be called municipal bonds, but is rather, are they municipal bonds within the meaning of that term as used in the constitution.

It may aid our understanding of the meaning of this section to take a short review of the origin and history of the fund with which it deals. Our permanent school fund, as is well known, is derived, in its greater part, from lands granted the state by the general government. The practice of reserving and setting apart for the use of the public

schools certain portions of the public domain had its origin in the earliest times. By the ordinance of May 20, 1785, which was the first enactment that authorized the disposal by sale of the public lands in the northwest territory, "Lot No. 16" in each township was reserved for the use of schools. Article III of the ordinance of July 13, 1787, declared that "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged;" and, by the ordinance of July 23, of the same year, "Lot No. 16," in every township was granted for school purposes. This policy became the fixed and settled policy of the government immediately after the adoption and ratification of the federal constitution, its earliest development in practical legislation being found, perhaps, in the act of April 30, 1802, the enabling act under which Ohio was admitted as a state into the Union. In that act certain propositions were offered by the United States to the people of the incipient state, "for free acceptance or rejection," the first of which was,

"That the section number sixteen, in every township, and where such section has been sold, granted or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of schools."

In all laws passed subsequent to this act relating to the primary disposition of the soil, section number 16, in every township, has been reserved from sale for the use of schools, and in the acts authorizing the admission of new states into the Union, these sections have been granted to the state for that purpose. The act creating the territory of Washington, made a like reservation, the reservation, however, including section thirty-six as well as section sixteen; and, when the territory was admitted as a state, these sections were granted it for use of the common schools. But so solicitous was Congress for their preservation and main-

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tenance, that it annexed a condition to the grant to the effect that the land so granted should not be sold for less than ten dollars per acre, and that the proceeds thereof when sold should constitute a permanent school fund, the interest only of which should be used in support of such schools.

The framers of our constitution carried out the evident wishes of Congress in this respect, in both letter and spirit. They not only made ample provision for the education of the children residing within the state, but were equally solicitous for the preservation of the permanent school fund. Article IX of the constitution is devoted entirely to the subject of education. Section 1 of that article declares that it is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex; and section 2, that the legislature shall provide for a general and uniform system of public schools. Section 3 provides that the principal of the common school fund shall remain permanent and irreducible; and section 5, that all losses to the fund which shall be occasioned by defalcation, mismanagement, or fraud, of the agent or officers controlling or managing the same shall be audited by the proper authorities of the state, and that the amount so audited shall be a permanent funded debt against the state in favor of the fund, and shall not be counted as a part of the indebtedness authorized and limited elsewhere in the constitution. Then follows, in a subsequent article and section, the provision for investing the fund—the provision in question here.

In the light of the care with which this fund has been nurtured and garnered, it would seem there was no escaping the conclusion that the framers and adopters of the constitution intended to define and fix irrevocably the character of the securities in which the fund might be invested. Doubtless they prohibited the loaning of the fund to private persons and corporations, and selected only the securities of gov-

ernmental agencies for its investment, because the latter, having a perpetual existence, are able to recuperate and acquit themselves of their financial obligations no matter how severely they may be racked by panics and financial depressions, while the former have not such recuperative powers. The words they used to define the securities in which the fund might be invested must, therefore, have had in their minds a fixed and definite meaning. By the terms "national, state, county, municipal, and school district bonds," they must have meant instruments which were then generally known to be such; instruments which the common mind then understood to be defined by those terms. This conclusion does not, as the relator seems to argue, confine the investment of the fund to bonds in existence at the time of the adoption of the constitution. The terms used do not name particular instruments, nor were they so intended, but they do, and were intended to, define instruments of a certain kind and character; the terms are descriptive as well as denominative.

The question then is, are bonds issued under the direction of a municipality, payable solely out of a special fund created by it, and for the payment of which its general credit is not pledged or otherwise bound, municipal bonds within the meaning of that term as used in the constitution. We answer unhesitatingly that they are not. Bonds of this character are of comparatively recent origin. At the time of the adoption of the constitution, they were practically unknown. No text work on municipal securities then in existence contained a discussion of them, and but few, if any, courts had then been called on to pass upon their constitutionality. They are the outgrowth of recent municipal exigencies. Hedged in as these corporations are by constitutional limitations as to the amount of indebtedness they can lawfully incur, they have been compelled, in order to procure some needed public conveniences, to resort to pledges of the income to be derived from the conveniences when con-

structed, and even the conveniences themselves, to raise the funds necessary for their construction.

But notwithstanding it may be true that it has become the settled doctrine of the courts that the legislature may lawfully authorize the issuance of such pledges, prescribe their form, and give them such name as it chooses, it does not follow that they are lawful investments for the permanent school fund. The fact alone that they were unknown at the time of the adoption of the constitution precludes the possibility of their having been included in any definition used in that instrument; but, more than this, the very term "municipal bond" precludes the idea that bonds of the character above mentioned can be bonds such as the constitution describes. The term itself imports a municipal debt or obligation. The common mind understands from the fact that a municipal bond is issued that a municipal debt has been created, and that the faith and credit of the municipality issuing the bond is pledged to its payment. The term, it seems to us, can admit of no other definition. Certainly it cannot have been so loosely used as to include every form of obligation that the ingenuity of the legislature might devise and call municipal bonds; yet, if bonds payable out of a special fund are such simply because a municipality is instrumental in creating that fund, this proposition must stand admitted, for there is no limitation upon the power of the legislature to authorize the creation of special funds by municipalities, nor is there any limitation as to the source from which the money to create the special fund may be drawn. Indeed, if bonds of the character here described are municipal bonds, there can be no form of obligation, either public or private, in which the legislature might not, by the legerdemain of making it a municipal special fund, lawfully authorize the investment of the permanent school fund. Such was not the intention of the constitution makers, and we cannot so hold.

Measured by these tests, the bonds in question are clearly

not municipal bonds in which the board of state land commissioners are authorized to invest the permanent school fund. Not only does the statute law which authorizes their issuance, and the ordinance which carries that authorization into execution, expressly declare that the bonds are not obligations of the city of Port Townsend, but it is shown that, if by any form of reasoning they could be held so to be, they would be void for want of power on the part of the city to incur such an obligation. That municipality neither could, nor did, pledge its credit for their payment, and, as we have shown, without such pledge they cannot be "municipal bonds" within the meaning of that term as used in the constitution.

The application for the writ is denied.

MOUNT, C. J., HADLEY, RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

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[No. 5321. Decided September 11, 1905.]

PASQUALE DEMASE, *Respondent*, v. OREGON RAILROAD & NAVIGATION COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURY TO SECTION HAND RIDING ON PUSH CAR ATTACHED TO TRAIN — NEGLIGENCE OF COMPANY — QUESTION FOR JURY. The use by a railroad company of a push car attached to a train by a rope, for the purposes of transporting its section crew, cannot be said, as a matter of law, to be the exercise of the care required on the part of the company in that regard, but the question is for the jury.

SAME—LIABILITY OF PUSH CAR TO LEAVE TRACK—ASSUMPTION OF RISK—KNOWLEDGE OF SECTION HAND. A section hand riding for the first time on a push car attached to a train does not necessarily assume the risk of the car's leaving the track, and does not stand on equal footing with the foreman as to knowledge of the danger, and whether he assumed the risks is for the jury.

¹Reported in 82 Pac. 170.

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Opinion Per Curiam.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered March 15, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a section hand riding on a push car attached to a train. Affirmed.

W. W. Cotton, L. S. Wilson, and Thos. O'Day, for appellant.

Roche & Onstine, for respondent.

PER CURIAM.—On and prior to the 21st day of July, 1903, the defendant railway company operated a branch line of road about seven miles in length, between Wallace and Burke, in the state of Idaho. There was a heavy grade of from 180 to 200 feet to the mile along this branch, and but one mixed train was operated thereon daily. The conductor in charge of this train had practically entire charge of the branch. The plaintiff and four other Italians, under a foreman or boss, were section hands in the employ of the defendant. The section crew were provided with a push car, which they attached to this train with a rope about fifteen feet in length, when going up the grade. The push car was provided with a brake, and came down the grade by gravity. Whenever the section crew desired to go up the grade, they would flag the train and attach the push car on behind; and when they reached their destination, the push car would be detached by drawing the pin which connected it with the train. While the plaintiff and his witnesses testified that they never rode on the push car before the day of the accident complained of, yet it appears from the entire testimony that the push car was furnished for that purpose, and that, if the train to which the push car was attached did not stop for other reasons at the destination of the section crew, it would be necessary for the crew to ride on the push car.

On the 21st day of July, 1903, the section crew in ques-

tion attached the push car to the train, boarded the push car at the request of the foreman or boss, and started up the grade. After they had proceeded from a quarter to half a mile, and when the train had attained a speed of from twenty to thirty miles per hour, the push car left the track, and the wheels passed over the plaintiff's leg causing the injuries for which he seeks to recover damages in this action. From a judgment and verdict in favor of the plaintiff, this appeal is prosecuted.

The principal contention of the appellant is that the facts were undisputable that the respondent assumed all risk incident to riding on the push car, under the circumstances stated, and that the court should have directed a judgment in its favor. It appears from the testimony, especially that of the appellant, that the appellant undertook to carry its employees up the line of the branch in question by means of this push car. It was therefore incumbent on the appellant to exercise ordinary care in that regard, and to see that no injury befell its employees while in transit, by reason of negligence on its part. From all the testimony in this case, it cannot be said, as a matter of law, that the appellant used that degree of care, or that a push car, attached to a train running at a high rate of speed, was a reasonably safe means of conveyance. We think that the question of negligence on the part of the appellant was clearly one of fact for the jury.

Was the danger of riding on this push car so imminent and apparent that the employees assumed the risk? It cannot be said that it was. The principal danger to be anticipated would be from the push car leaving the track, as it did in this instance. Under what circumstances a car of this structure would leave the track cannot be said to be a matter of common knowledge, nor did the section hand and the foreman and other persons in charge of the road necessarily stand upon an equal footing with regard to such knowledge. According to the testimony of the respondent,

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Opinion Per Root, J.

he never rode on the push car before the day of the accident, and according to the testimony of the appellant's foreman, not to exceed once or twice. The knowledge, and the means of knowledge, on the part of the respondent, and the nature of the dangers to which he was subjected, clearly distinguish this case from *Lee v. Northern Pac. R. Co.*, 39 Wash. 388, 81 Pac. 834. Under all the circumstances, we are satisfied that the question of negligence on the part of the appellant, and of assumption of risk on the part of respondent, were for the jury and not for the court.

There was no prejudicial error in the instructions of the court, and the judgment is therefore affirmed.

[No. 5618. Decided September 12, 1905.] ,

WILLIAM H. KEIM, *Respondent*, v. CLARA R. RANKIN *et al.*,
Appellants.¹

EVIDENCE—WRITINGS—UNAUTHENTICATED COPIES OF COURT PROCEEDINGS—IMPROPER INTRODUCTION FOR PURPOSE OF IMPEACHMENT—PAPERS NOT IMPEACHING WITNESS. Where a witness had testified that he had had no notice of a certain suit in a foreign court, copies of records and documents therein not authenticated in any way are not admissible for the purpose of impeachment of the witness, on his testimony that he had seen the papers, where it is uncontradicted that he did not read the papers at the time and did not know their contents.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered April 15, 1904, upon the verdict of a jury rendered in favor of the plaintiff in an action against endorsers on promissory notes. Reversed.

R. J. Danson, for appellants.

Tolman & Kimball, for respondent.

ROOT, J.—This action was instituted by respondent to recover from appellants as endorsers on six promissory notes.

¹Reported in 82 Pac. 169.

From a judgment in favor of respondent, an appeal is taken.

The principal issue of fact upon the trial was as to whether protest had been waived by appellants when said notes were endorsed. Upon this question the evidence was conflicting. The only assignment of error necessary for us to consider is as to the action of the trial court in admitting in evidence certain purported copies of papers used in connection with proceedings claimed to have been had in certain courts in the state of Ohio. None of these documents were in any manner authenticated. They were introduced in evidence by respondent as a part of his cross-examination of appellant O. L. Rankin. Said appellant was asked, upon direct examination, if he knew anything about one L. L. Rankin having paid upon these notes any of the proceeds of the estate as trustee, and if he knew of proceedings begun, after appellant left, with reference to the deeds or debts. Appellant answered in the negative. He further said that he had received no notice of said proceedings, and had entered no appearance therein. Upon cross-examination, he was asked if he remembered as to that matter having been discussed in the office of respondent's attorney. He answered in the affirmative. He was further interrogated by said attorney as follows:

"Is it not a fact, Mr. Rankin, after you looked over those papers and the notes, that you told me you supposed these notes were paid out of the proceedings, out of the funds coming from these proceedings? Ans. Yes, sir, I told you that, sir."

Then appellants' attorney propounded the following questions, to which he answered as indicated:

"Did you read those papers over at that time? Ans. No, sir. Q. I will ask you to state whether or not it is a fact that you supposed, when he referred to proceedings, that it was a foreclosure of a certain mortgage upon this homestead? Ans. Yes, sir, in Columbus, Ohio."

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Opinion Per Root, J.

The documents were then received in evidence over appellants' objection. Mr. Rankin's statement that he did not read these documents was not disputed by any evidence in the case. His statement that he did not know of the proceedings in the Ohio courts, and had never made any appearance therein, remained uncontradicted. The documents introduced were purported copies of two petitions and two orders of court, and contained numerous allegations and statements well calculated to prejudice the rights of appellants before the jury. They seem to have been introduced for the purpose of impeachment. Because Mr. Rankin said he saw the papers as they were attached to the notes in the attorney's possession, it seems to have been thought that their introduction in some manner disputed his testimony. But as his evidence is that he did not read them, but supposed them to refer to an entirely different transaction, which evidence was absolutely undisputed, we can see no possible justification for their reception in evidence. As none of them were certified by any officer, court, or person, or authenticated in any manner, they were, of course, incompetent for the purpose of proving any of the facts therein alleged. Their only effect was to get before the jury much immaterial and incompetent matter highly prejudicial to appellants.

For this error, the judgment of the honorable superior court is reversed, and the cause remanded for a new trial.

MOUNT, C. J., CROW, HADLEY, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

[No. 5620. Decided September 12, 1905.]

ALICE A. ELLIS, *Respondent*, v. C. W. MOON, *Defendant*,
and L. D. BARDIN *et al.*, *Appellants*.¹

APPEAL — DISMISSAL — MOTION DENIED — NO RECONSIDERATION AT HEARING ON MERITS. After passing upon a motion to dismiss an appeal, the supreme court will not again consider the motion at the trial on the merits.

JUDGMENT—VACATION—ERRONEOUS JUDGMENT ON THE PLEADINGS—REMEDY BY APPEAL. Where, after filing an amended pleading, judgment on the pleadings is granted upon motion of the adverse party, the remedy is by appeal and not by motion to vacate the judgment for irregularity.

APPEAL—DISMISSAL FOR FAILURE TO PROSECUTE—BAR. After the dismissal of an appeal from an erroneous judgment, for failure to prosecute it, the error cannot be reviewed by an appeal from an order refusing to vacate the judgment.

Appeal from an order of the superior court for Chelan county, Brown, J., entered December 17, 1904, denying defendants' motion to vacate a judgment entered upon the pleadings on motion of the plaintiff. Affirmed.

S. D. Griffith, for appellants.

Frank Reeves and *Reeves & Reeves*, for respondent.

Root, J.—Respondent contracted with defendant Moon for the construction of a building in Wenatchee. To guarantee the faithful performance of said contract, a bond was executed by said Moon to respondent, upon which bond appellants were sureties. This action was brought by respondent to recover against Moon and appellants by reason of a breach of said contract and bond. Appellants interposed an answer to respondent's complaint, and thereafter they, or some of them, filed amendments to the answer, the same not constituting a separate pleading, but being intended evi-

¹Reported in 82 Pac. 186.

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Opinion Per Root, J.

dently as portions of the original answer, and being designed to be considered with said original answer as an amended answer to the complaint.

Respondent thereupon moved for a judgment upon the pleadings, as against these appellants, which motion was, by the trial court, granted. From this judgment, an appeal was taken by appellants to this court. Said appeal was subsequently dismissed for the reason that no transcript was brought up within the time required by law. *Ellis v. Bardin*, 36 Wash. 122, 78 Pac. 677. Shortly after said judgment was taken, appellants moved to have the same vacated for the reason that the same had been irregularly entered. This motion was not acted upon by the trial court until after the appeal had been dismissed as aforesaid. Said motion to vacate was then overruled by the trial court. From the order overruling said motion, this appeal is taken.

In her brief, respondent moves to dismiss this appeal, and makes a somewhat extended argument in support of her motion. A similar motion was made by her, and overruled by this court on the 13th of January, 1905. Having passed upon the motion at that time, the court cannot again consider it.

Appellants argue that a judgment taken against the sureties upon a bond, before any judgment is had against the principal, and while the same action is pending against the principal upon the bond, is an irregularity. They also claim, that in this case the trial court did not consider the amendment which they had filed to the original answer; that said amendment, together with the original answer, constituted a perfect defense to the complaint; that, if the form of said pleadings was incorrect, an objection should have been raised thereto by a motion to strike or by some other appropriate motion, instead of moving for a judgment upon the pleadings.

Respondent contends that the things complained of by appellants do not constitute an irregularity, as that term is used in the statute providing for a motion to vacate, but

that, if the action of the court was wrongful, the judgment of dismissal was an erroneous judgment rather than one irregularly entered, and that appellants' remedy was by appeal; and that, having taken an appeal and the same having been dismissed, they are not now in a position to have the error reviewed by an appeal from the order overruling its motion to vacate the judgment. We think this contention must be sustained.

If the trial court had rendered the judgment upon its own motion, or in any manner without having the pleadings called to its attention, it might have constituted an irregularity which could have been moved against, and, if such motion were denied, an appeal would lie therefrom. But in this case the pleadings were tested by the motion for a judgment. It must be presumed, in the absence of a showing to the contrary, that, when the motion for judgment was made, the court considered all the pleadings that were on file in the case, and it will also be presumed that the court considered the condition of the parties and of the litigation as revealed by all these pleadings. It may have been, and probably was, improper for the court to have made and entered the judgment upon the pleadings in favor of respondent against these appellants at the time it did. If so, this was an error that could have been corrected upon appeal. *Dickson v. Matheson*, 12 Wash. 196, 40 Pac. 725. Appellants, having taken their appeal, but having neglected to prosecute the same, cannot now be heard to complain of the error.

The judgment of the superior court is affirmed.

MOUNT, C. J., CROW, RUDKIN, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

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Opinion Per Curiam.

[No. 5547. Decided September 13, 1905.]

AMORY D. WAINWRIGHT, *Respondent*, v. GRACE HOWARD
WAINWRIGHT, *Appellant*.¹

APPEAL—REVIEW—DIVORCE. The findings in a divorce suit will not be disturbed on appeal if justified by the evidence.

Appeal from a judgment of the superior court for King county, Bell, J., entered December 24, 1904, upon findings in favor of the plaintiff after a trial on the merits, granting a divorce. Affirmed.

Carr & Preston, for appellant.

Shepard & Lyter, for respondent.

PER CURIAM.—This appeal is from a decree of divorce granted to the respondent. No good purpose can be subserved by discussing the testimony in a meretricious divorce suit. Suffice it to say, that the respondent by his own confession was of a salacious nature, while the record as plainly shows that the appellant was cold, designing, and venal, and that she took advantage of the almost imbecile weakness of the respondent for the purpose of profiting financially by his confessed immoral conduct. We think the court was justified in finding that the appellant had abandoned the respondent, and that the judgment was right.

Affirmed.

¹Reported in 82 Pac. 1135.

[No. 5487. Decided September 13, 1905]

J. H. HANNON, *Respondent*, v. F. STANLEY MILLICHAMP,
Appellant.¹

APPEAL—RECORD—INSUFFICIENCY—ORDER BASED IN PART ON AFFIDAVITS NOT BROUGHT UP IN STATEMENT OF FACTS—REVIEW. An appeal from an order appointing a temporary receiver, which recites that it is based upon the complaint and affidavits, will be dismissed if the affidavits are not brought up by a bill of exceptions or statement of facts, since it will be presumed that the affidavits warrant the order appealed from; and if the appellant prefers, the order will be affirmed.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered October 1, 1904, after a hearing on affidavits, appointing a temporary receiver upon the application of the plaintiff. Affirmed.

O. C. Moore and *B. O. Graham*, for appellant.

Fred C. Pugh (*Barnhart, Laughon & Pugh*, of counsel), for respondent.

DUNBAR, J.—This appeal is from an order appointing a temporary receiver. The respondent moves to dismiss the appeal, and for an order affirming the judgment of the trial court, because it appears from the record that the order appealed from was made after a hearing upon the merits of the application, at which time the court considered the complaint and various affidavits of the respective parties; and because the affidavits referred to in the order are not in the record by a bill of exceptions or statement of facts. The recital of the judgment in this particular is as follows:

“This cause having been duly continued from September 26th to September 29th, 1904, at 9:30 o’clock, a. m., and from September 30th at 1:30 o’clock, came regularly on for hearing on said date on plaintiff’s application for a

¹Reported in 82 Pac. 168.

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receiver pending the litigation, and after hearing the complaint, motion, and various affidavits of the respective parties, and the argument of counsel, and it appearing to the court that a partnership exists between plaintiff and defendant, and that an emergency exists for the appointment of a receiver for the property of said partnership described in the complaint, in order to prevent said property from being lost, removed, or materially injured, and to secure ample justice to the parties, it is ordered," etc.

It was decided by this court, in *Anderson v. McGregor*, 36 Wash. 124, 78 Pac. 776, that, where a judgment is based on the pleadings and evidence submitted in the form of affidavits filed, the failure to make the affidavits part of the record by bill of exceptions or statement of facts is fatal to a review of the judgment on appeal. In that case it was said:

"It is also insisted that the appeal should be dismissed for the reason that the entire judgment appealed from is based, as appears from the judgment itself, upon the pleadings and evidence submitted in the form of affidavits filed. The record shows this to be the case. These affidavits are not made a part of the record in this case, either by bill of exceptions or statement of facts, and, while this objection might more appropriately be raised on the merits of the case than on a motion to dismiss, it is, in any event, fatal to the appellant's right to have the judgment of the lower court reversed in this court."

In *Johnson v. Spokane*, 29 Wash. 730, 70 Pac. 122, it was held that, where a judgment of nonsuit recites that it is based on pleadings and the opening statement of counsel for plaintiff, the appeal will be dismissed where the record does not contain such opening statement, the court in its opinion in that case saying:

"So far as this court knows, the counsel for the plaintiffs in this case may have made a statement which would have been a defense to the action and precluded a recovery, and that is the very reason why the opening statement should have been brought here, so that the court could determine that

fact. All presumptions are in favor of the judgment; hence we cannot conclude that the court erred in dismissing the cause upon the statement of counsel, without the opportunity of investigating that question. It is insisted by counsel that the case was dismissed by the court for the reason that the complaint was insufficient, and that the court so adjudged it, and therefore it was not necessary for him to determine or consider the sufficiency of any opening statement. But such is not the language of the judgment. It is that the defendant was entitled to judgment on the pleadings and on the opening statement of counsel for plaintiffs. This evidently means that, in the opinion of the judge, the pleadings, construed in connection with the opening statement, or as construed in the light of the opening statement, preclude a recovery."

And so it may be gathered from the record in this case that the court was constrained to appoint a temporary receiver by reason of the allegations of the complaint, supplemented by matters which appeared in the affidavits, and the affidavits not being brought here, the court will not presume that they were not in aid of the judgment. The same proposition was discussed in *Pierce v. Fawcett*, 31 Wash. 271, 71 Pac. 1011, where it was held that an appeal would be dismissed because of the absence of a statement of facts, although the appellant sought only the review of a question of law on the pleadings as to whether the action appeared therefrom to have been commenced in time, where the judgment of the court recites that the decision was based on other matters before the court as well as upon the application of the statute of limitations to the facts pleaded. The record upon which the court acted not being here, and all presumptions being in favor of the validity of the judgment, the same will not be disturbed.

It is contended by the appellant in his reply brief that, in any event, the motion should not prevail; but that, if the court finds upon an examination of the whole record that the judgment should not be disturbed by reason of the

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failure of the appellant to present to this court the record upon which the court below acted, the judgment of the court should be affirmed. It seems to us to make no difference in the result of the case whether the judgment is affirmed or the appeal dismissed, but inasmuch as the appellant prefers to have the case disposed of by an affirmance rather than by the motion to dismiss, the judgment of this court will be that the judgment of the lower court be affirmed.

MOUNT, C. J., HADLEY, and ROOT, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 5529. Decided September 13, 1905.]

CARRIE L. BRINGGOLD, *Respondent*, v. OTTO BRINGGOLD,
Appellant.¹

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40	264

APPEAL—STATEMENT OF FACTS—NOT PROPERLY INDEXED—GROUND FOR STRIKING. Failure to index a voluminous record is ground for imposing terms or striking the statement.

SAME—GENERAL EXCEPTION TO FINDINGS—SUFFICIENCY One general exception to findings of fact is insufficient to secure a review of the evidence, nor is the case aided by a colloquy between the court and counsel as to the findings that should be made, when no definite exceptions appear in the record.

SAME—EFFECT OF FAILURE TO EXCEPT TO FINDINGS. Upon failure to except to findings of fact, the statement of facts will be retained for the sole purpose of reviewing the action of the court in excluding evidence offered by appellant.

WITNESSES — IMPEACHMENT — GENERAL REPUTATION — LIMITED KNOWLEDGE OF IMPEACHING WITNESSES—QUESTIONS AS TO SPECIFIC CONDUCT—EXCLUSION. A witness cannot be impeached where the acquaintance was so limited that the general reputation could not have been known, or by testimony relating only to specific conduct.

APPEAL—REVIEW—EXCLUSION OF EVIDENCE—HARMLESS ERROR. In a case tried before the court without a jury, it is harmless to exclude evidence to impeach a witness, where the court states that it attaches no weight to the evidence of such witness.

¹Reported in 82 Pac. 179.

Appeal from a judgment of the superior court for Spokane county, Honorable A. G. Kellam, Judge *pro tempore*, entered June 30, 1904, upon findings in favor of the plaintiff after a trial on the merits before the court without a jury, granting a divorce. Affirmed.

Peacock & Wells, for appellant.

A. H. Kenyon, for respondent.

HADLEY, J.—This is an action for divorce, in which the wife is plaintiff. A decree of divorce was entered in her favor, and a disposition of property was made. Defendant has appealed. Respondent has moved to strike the statement of facts upon the ground that it is not indexed in accordance with rule 3 of this court. The statement contains one thousand three hundred and sixty-one pages of typewritten matter. A number of witnesses were examined and some were frequently recalled, but there is no index showing who testified, or upon what ones of the numerous pages the testimony of any single witness may be found. For such an omission to comply with a well-known rule, in a case containing such a large amount of testimony, we believe the court would be justified in imposing terms, or in even refusing to consider the statement altogether. But, in view of the record and of the disposition that must be made of the case, we shall pass over that ground of the motion. The condition of the record is such that it relieves us of a laborious search through the entire mass of testimony, and for that reason alone we pass over this subject.

Respondent also moves to strike the statement of facts for the reason that no exceptions were taken to the findings of facts or conclusions of law. We find no written exceptions in the record, except the following memorandum which appears at the close of appellant's proposed findings of facts and conclusions of law:

"The above findings of fact except so far as they are duplicated in findings signed, refused. Conclusions of law

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refused Defts. except & exception allowed. Dated June 29th, 1904. A. G. Kellam, Judge *pro tem.*"

Under repeated decisions of this court, the above is not sufficient, it being merely general, and specifying no particular finding that was either made or refused concerning which exception is taken.

Appellant's counsel refer to a certain colloquy between court and counsel, which is set forth in the statement of facts, from which they urge that it appears that they were excepting to the court's findings and to its refusal to find as proposed. The conversation was merely of a general character concerning what the court should find. Such a record is wholly insufficient as furnishing the definite exceptions required. There were no exceptions filed in writing at any time, and no definite ones appear by the record to have been stated to the trial court at the time the findings were signed, so as to be clearly understood by that court, or by this one, as required by Bal. Code, § 5052.

Under such circumstances, this court has in some instances stricken the statement of facts. In the recent case of *Lilly v. Eklund*, 37 Wash. 532, 79 Pac. 1107, it was, however, held that, for failure to except to the findings, the statement would not be actually stricken, but that it would be held and considered for the sole purpose of reviewing that portion of it which had to do with the action of the court in excluding evidence offered by appellants. Following the rule there adopted, we decline to strike the statement now before us, but shall consider it for said purpose only.

Appellant presents but two assignments of error concerning the exclusion of testimony offered by him. The first relates to the offered testimony of certain witnesses as bearing upon the character of a woman who had testified in the case, and whom appellant sought to impeach. The assignments in the brief refer to designated portions of the statement of facts, which we have examined. One witness interrogated stated that he merely knew the woman by sight,

and the other testified that she had known her but two weeks. It would seem that the testimony of witnesses with such limited knowledge concerning the general reputation for character of another witness could not have been of much value. Moreover, the questions did not call for knowledge of the general reputation, but for specific conduct supposedly within the knowledge of the witnesses. It was not error to sustain the objections to the questions.

The other assignment is to the effect that the court should have required respondent to produce a certain subpoena, together with the officer's return of service thereof, which subpoena the said female witness had testified was served upon her by an officer. It is appellant's theory that she was not served with the subpoena by an officer, and that a conversation between her and such officer, of which she testified, did not occur. The record shows that the court refused to go further into details concerning the character and testimony of said female witness, for the reason that it believed that it was already sufficiently advised. The court expressly stated that, whatever might be the effect of the testimony of said witness, it would make no difference so far as its action in the case was concerned. The remarks of the court indicated that it attached no weight to the testimony of said witness as against appellant, and that it was not so considered. The production of the excluded impeaching evidence would not, therefore, have strengthened appellant's position in the mind of the trial court and we are satisfied that it would not have changed the result in this court. It was therefore not prejudicial error to exclude the testimony under such circumstances.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, DUNBAR, and ROOT, JJ.,
concur.

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Opinion Per MOUNT, C. J.

[No. 5698. Decided September 13, 1905.]

IDA KANE (*formerly Ida Miller*), Appellant, v. G. N.
MILLER, Respondent.¹

DIVORCE—ACTION TO MODIFY DECREE—CUSTODY OF CHILDREN—WELFARE PARAMOUNT CONSIDERATION—CONDITION OF PARENTS—SCHOOL ADVANTAGES—WISHES OF CHILDREN—EVIDENCE—SUFFICIENCY. The custody of minor children being determined by considerations as to their welfare, rather than the claims of the parties, it is error to enforce a decree of divorce requiring the mother to relinquish to the father the custody of two boys after they attain the age of ten years, where it appears that both parties have remarried, that the mother is permanently located near the best of schools, which they attend, has no other children and is able to and does give them the best of care and attention; while the father has no permanent location, is much away from home, has another child, and took no steps for several years to secure their custody when entitled thereto, and discontinued contributing to their support; especially where both children are attached to the mother and prefer to remain with her.

SAME—CONCLUSIVENESS OF DECREE IN ABSENCE OF APPEAL—AWARD NOT FINAL—CHANGE IN CONDITIONS. A decree of divorce unappealed from, awarding the custody of children to one of the parties, is not final, if the award was subject to the further order of the court; nor is it final where the conditions of both parties have been changed by remarriage and other conditions affecting the welfare of the children.

Appeal by the plaintiff from a judgment of the superior court for Walla Walla county, Brents, J., entered March 24, 1905, modifying a decree of divorce, after a hearing before the court without a jury, upon the application of the defendant for the custody of the children. Reversed.

Sharpstein & Sharpstein, for appellant.

Brooks & Bartlett, for respondent.

MOUNT, C. J.—This proceeding was brought in the lower court to modify a decree of divorce relating to the custody of two minor children of the parties. Upon the hearing,

¹Reported in 82 Pac. 177.

the decree was modified so as to give the custody of the children to the father, until August 25, 1905; then to the mother until February 1, 1906; and then to the father until the further order of the court. The mother appeals from that order.

The facts, as shown by the record, are in substance as follows: On October 2, 1900, the superior court of Walla Walla county granted a decree of divorce to the appellant, divorcing her from the respondent on the ground of cruelty. At that time, the two little boys, the fruits of the marriage, were seven, and eight and one-half, years old, respectively. In the decree the court made the following order:

"And it is now here further considered and ordered by the court that the plaintiff have, and she is hereby awarded, the custody, guardianship, and management of Edmund Clarence Miller, who was born on the 14th day of April, 1892, and Ferdinand Victor Miller, who was born on the 10th day of September, 1893, the minor children of said plaintiff and defendant, until they respectively attain the age of ten years, or until the making of an order in the meantime relative thereto, and that the said defendant have, and is hereby awarded, the custody, guardianship, and management of such children thereafter until the further order of the court in the premises."

The decree also required the respondent to pay to the appellant \$20 per month for the support of the children until they should arrive at the age of ten years. Soon after the date of this decree of divorce, the appellant took the children to Seattle, where she had property interests, and where she has since resided with them. The respondent also made his headquarters in Seattle, a considerable part of the time thereafter. On May 17, 1902, the respondent was again married. He now has one child, an infant daughter, by his second wife. On May 29, 1903, the appellant was married to a man by the name of Kane. She has no children by her second marriage. The older boy became ten years

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of age on April 14, 1902, and the younger, on September 10, 1903.

After the boys became ten years of age, they were left with the mother. The father refused to make any provision for them after that time. The father, however, testified on the hearing in this proceeding that he demanded the custody of the older boy about the time he became ten years of age, but that his demand was refused. He took no steps, however, to secure the custody of either of the boys after that time, until this hearing. The evidence shows conclusively, that the mother is a proper person to have their care and custody; that she is amply able to support and educate the boys; that she has kept them in school in Seattle continuously, where they have been good students and well behaved; that she has clothed them well, and carefully looked after their comforts; that they have been regular attendants at Sunday school—in short, the training and care and comforts of the boys have been all that a devoted mother could give them. They are strongly attached to their mother and stepfather, both of whom reciprocate the attachment.

At the time of this hearing, in March, 1905, the boys were aged eleven and a half, and nearly thirteen, respectively. They are apparently bright and thoughtful boys, and both stated upon the witness stand that they desired to be with their mother. They also stated that their mother had taught them to think well of their father, and that they did so. The respondent is a civil engineer by profession. His work takes him from place to place, so that up to the time of this hearing he had no fixed permanent abode. The evidence shows that he is competent and suitable to have their care and control. His present wife, when asked if she would be willing to give the boys the same care and attention that she would her own child, answered: "Yes, I should be very happy to take them and give them all the care I can. The boys are so old now that they would be mostly under their father's control." Upon these facts, which we think cover

the substance of the evidence, the lower court modified the original decree, as follows:

"It is hereby by the court ordered that the defendant have the custody, management, and control of said minor children until the 25th day of August, 1905, unless otherwise ordered by the court, and that the defendant on said date deliver to the plaintiff at her residence in the city of Seattle, county of King, the said children, if she be then ready to receive them. It is further ordered by the court that the plaintiff have the care, custody, and control of said minor children from the 25th day of August, 1905, until the 1st day of February, 1906, . . . and that defendant have the custody, management, and control of said children from that date until the further order of the court."

The order then provided that the defendant give a bond in the sum of \$5,000, conditioned that he would comply with each order of the court made, and to be made, herein. The effect of this order was to modify the original decree to the extent of giving the mother the custody of the children from August 25, 1905, to February 1, 1906. The modification made no other change in respect to the custody of the children except that it required a bond from the husband.

In determining the custody of these minor children, the primary object to be attained is their welfare. To this object, the claim and personal desires of the parents, and even the wishes of the children, must yield, especially if such desires or wishes are opposed to that object. 14 Cyc. 805, and cases cited; 9 Am. & Eng. Ency. Law (2d ed.), 867, 868; 2 Bishop, Marriage, Div. & Sepa., § 1161; *Kentzler v. Kentzler*, 3 Wash. 166, 28 Pac. 370, 28 Am. St. 21; *Umlauf v. Umlauf*, 128 Ill. 378, 21 N. E. 600.

With this rule in mind, and conceding that both the father and the mother are situated equally, so far as their ability to care for the children, and so far as their love and desires for the company of the children are concerned, we still think, under the circumstances surrounding this case, that

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the welfare of these two boys demands that they should be left indefinitely with the mother. She has a fixed and permanent abode in the immediate vicinity of schools and churches unsurpassed in the state. She has a comfortable and happy home, and no other children with whom to divide her care. Her husband is attached to the boys and they reciprocate that attachment. With their natural mother, under the conditions shown by the evidence, the home influences and surroundings are very fortunate.

On the other hand, the abode of the father is not fixed and permanent. He must go from place to place in the pursuit of his occupation. If the boys follow with their father, their school advantages must necessarily suffer. They are at an age now when neglect or disadvantage in the matter of their education must be a serious consideration. The order appealed from removes these boys from their school in the midst of the school year. The stepmother has one child of her own, which naturally, in its infancy and subsequent years, must receive its mother's first care and consideration. She could not be to these boys what their own natural mother will be. It is true, the stepfather, even though he loves and cares for the boys, cannot be to them as their own father; but naturally the company, comfort, and advice of the mother is of greater value for good than that of the father. All other things being equal, this fact is a potent one to turn the scale in favor of the mother. When we consider the other advantages, above referred to, in favor of the mother, and in addition thereto the desires of the boys themselves, who are old enough to know their own minds in the matter, and whose wishes may be consulted where the rights and capabilities of the parties are evenly balanced (14 Cyc. 808f, and cases cited), we have no doubt, and do not hesitate to say, that the welfare of these boys places them with the mother.

Respondent invokes the rule that "a decree of the superior court which determines the custody of infant children, from which no appeal has been taken, is conclusive upon the court which rendered the decree, and upon all other courts, in the absence of a material change in the condition and fitness of the parties, or the requirements for the welfare of the child." *Koontz v. Koontz*, 25 Wash. 336, 65 Pac. 546; *Irving v. Irving*, 26 Wash. 122, 66 Pac. 123. This rule is probably not applicable to this case as to the conclusiveness of the decree, because here the award of the custody was not final, but was subject to the orders of the court.

Conceding, however, that the original order was final and that the rule as stated does apply, there has been in this case a material change in the condition and fitness of the parties and requirements for the welfare of the children, since October, 1900, when the decree was rendered. The conditions of both father and mother have been changed. Both have remarried since the original decree. The mother has, under the evidence, improved her condition, in that she is better able to provide for the boys now than formerly; her home life is more secure and stable, and more congenial. The father's condition is also improved, because he now has a wife to look after the home life of the boys. The evidence, however, discloses the fact that his home is not congenial to the boys, and this fact fully offsets whatever there is in his improved condition. We think the advantage in the condition and fitness in this case is almost wholly in favor of the mother. For these reasons, and others which we have not found it necessary to discuss, we are satisfied that the original order in reference to the care and custody of the boys should be modified so as to award them to the mother indefinitely.

The cause is therefore remanded to the lower court, with directions to award the care and custody of the children named to the mother from and after August 25, 1905, with

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such provisions toward their maintenance, and for visits by the father, as the lower court may deem necessary.

CROW, ROOT, RUDKIN, FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 5015. Decided September 14, 1905.]

LEOPOLD F. SCHMIDT *et al.*, *Appellants*, v. OLYMPIA LIGHT & POWER COMPANY, *Respondent*.¹

APPEAL — QUIETING TITLE — PLAINTIFFS OUT OF POSSESSION AND LANDS NOT VACANT—FORM OF ACTION—POINT FIRST RAISED IN SUPREME COURT. In an action to quiet title to land, the objection that the plaintiffs are out of possession and that the lands are not vacant or unoccupied, and therefore the action cannot be maintained, goes merely to the form of the action and cannot be raised for the first time in the supreme court.

DEEDS — DESCRIPTION — CONSTRUCTION — ERRONEOUS REFERENCE TO FORMER CONVEYANCES—INCONSISTENT DESCRIPTION OF WATER RIGHTS—INTENTION OF PARTIES. Where a deed excepted certain water rights previously carved out of the estate, describing the same in two ways: (1) by reference to the water specifically describing the volume; and (2) by reference to the deed in which the water right was originally granted, which, however, described a smaller volume of water, and which water deed was also erroneously referred to as recorded in vol. 5, page 9; and a purchase money mortgage is given back to the grantors, also describing the reserved water in two ways, viz.: (1) by reference to the water deed recorded in vol. 5, page 9, and (2) by reference to the deed to the mortgagees, the mortgage expressly granting "the same premises" conveyed to the mortgagees; the intention of the parties, which must control as to the inconsistent descriptions, was to mortgage the identical property conveyed to the mortgagees reserving the water as therein described, and not as described in the water deed, with which the mortgagors and mortgagees were not familiar, as shown by the erroneous reference to the record thereof; since of two inconsistent descriptions, the erroneous one will be rejected as surplusage.

SAME—BONA FIDE PURCHASER—INCONSISTENT DESCRIPTIONS BOTH OF RECORD—CONSTRUCTIVE NOTICE. One claiming under a mortgage containing two inconsistent descriptions of the rights conveyed, one

¹Reported in 82 Pac. 184.

by reference to one deed and the other by reference to another deed, both of record, does not occupy any better position than the original mortgagee, and is not a *bona fide* purchaser, but takes with constructive notice of all the records.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered October 12, 1903, dismissing on the merits an action to quiet title to water rights, upon sustaining a demurrer to the reply. Reversed.

George H. Funk, James A. Haight, and Pipes & Tifft, for appellants.

T. N. Allen (Troy & Falknor, of counsel), for respondent.

RUDKIN, J.—The plaintiffs are the owners of a certain tract of land in Thurston county, containing one acre. Inasmuch as the description is by metes and bounds and the particular description not material, we will hereafter refer to it as the “one-acre tract.” The defendant is the owner of a certain four-acre tract adjoining the tract above described. For similar reasons, we will hereafter refer to it as the “four-acre tract.” Both tracts were originally a part of the Crosby donation claim.

On the 10th day of February, 1892, A. H. Chambers and wife and Robert Frost and wife were the owners of the one-acre tract, and were also the owners of a water power from the Des Chutes river, described as a “volume of water twenty inches deep, four feet seven inches wide, and flowing with a velocity of five hundred and twenty-two feet per minute,” coupled with the right to conduct said flow of water across the four-acre tract. On said 10th day of February, 1892, Duncan B. Finch and wife were the owners of the four-acre tract, subject to the water rights and easements above described. On the above date, Finch and wife conveyed the four-acre tract to Chambers and Frost, by bargain and sale deed. This deed was subject to the water rights

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and easements already owned by Chambers and Frost, which were described in the Finch deed as follows:

"Subject, nevertheless, to the grants of water power heretofore made by the said parties of the first part within the said described boundaries; that is to say, for the said flouring or grist mill of C. Crosby, heretofore described as 'Crosby's new mill,' a column of water twenty inches deep, four feet seven inches wide, and running with a velocity of five hundred and twenty-two feet per minute, which water power was granted by deed of C. Crosby and wife to C. Crosby & Co., recorded in the office of the county auditor of Thurston county in deed records, Vol. 5, page 9."

On the date of this deed, and as a part of the same transaction, Chambers and wife and Frost and wife mortgaged the four-acre tract to Finch to secure the payment of the purchase price of \$15,000. This mortgage was subject to certain water rights, which are described in the mortgage as follows:

"Subject, however, to two grants of water power within the said described boundaries, the first to the flouring or grist mill of C. Crosby, by deed recorded in deed records, Vol. 5, page 9, in the office of the county auditor of Thurston county; the second to Biles and Carter, by deed dated April 9, 1859, and recorded in said auditor's office in deed records, Vol. 4, page 64, being the same premises conveyed by mortgagee and wife to the mortgagors A. H. Chambers and Robert Frost, by deed bearing even date herewith. It is understood by all the parties hereto that said premises are hereby mortgaged for a portion of the purchase price as security for the payment to said mortgagee of a certain promissory note of even date of this mortgage."

It is conceded that the water deed from Crosby and wife to Crosby & Company, referred to in the deed from Finch and wife to Chambers and Frost, as recorded in Vol. 5, at page 9 of the deed records of Thurston county, and, in the mortgage from Chambers and wife and Frost and wife to Finch, as recorded in the same place, described the water power or right as a volume of water that might be drawn

from a pond through a gate three feet wide and one foot deep; but it is alleged in the reply that the water right was afterwards enlarged so as to contain a volume of water twenty inches deep, four feet seven inches wide, and flowing with a velocity of five hundred and twenty-two feet per minute, as described in the complaint.

The Finch mortgage was afterwards foreclosed, and the defendant has succeeded to all the right, title, and interest included in, or covered by, the mortgage. The record does not show that the plaintiffs, or their predecessors in interest at the time of the mortgage foreclosure, were made parties to that action, or that there was any adjudication in the foreclosure case as to the property actually included, or intended to be included, within the mortgage. The plaintiffs are the successors in interest to Chambers and wife and Frost and wife in the one-acre tract, and such water rights and easements appurtenant thereto as were not included in the Finch mortgage. This action was brought by the plaintiffs to quiet their title to the water right described as "a volume of water twenty inches deep, four feet seven inches wide, and flowing with a velocity of five hundred and twenty-two feet per minute," and also the right of way necessary to conduct the same across the four-acre tract now owned by the defendant.

The answer, in addition to denials, set forth affirmatively the defendant's title under the mortgage and its foreclosure, and prayed that the action be dismissed, and for all proper and equitable relief. Many of the facts above stated were contained in the reply to the answer. The court sustained a demurrer to the reply and, upon the refusal of the plaintiffs to plead further, a judgment of dismissal was entered. From this judgment, the plaintiffs appeal.

The appellants first contend that issues raised by the denials in the answer were not disposed of, and that this will necessitate a reversal of the judgment regardless of the other questions involved. In view of the conclusion we have

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reached on the merits, this question becomes immaterial. The respondent, on the other hand, contends, that this is an action to quiet title; that the plaintiffs are out of possession; that the lands are not vacant or unoccupied; and therefore such an action cannot be maintained. This objection only goes to the form of the action, and cannot be raised for the first time in this court. *Bates v. Drake*, 28 Wash. 447, 68 Pac. 961. It does not appear that the objection was raised in the court below, and, had it been, it would only necessitate an amendment of the pleadings, and would not justify a judgment on the merits such as was rendered.

This brings us to the merits of the case. The main question is, what property was included in the mortgage from Chambers and Frost to Finch, under which the respondent claims? By reference to the foregoing statement, it will be seen that the deed from Finch to Chambers and Frost described the water right reserved in two ways: first, by reference to the volume of water; and second, by reference to the record of the Crosby deed by which the water right was granted. It is conceded that a part of this description is erroneous, as the deed therein referred to was not recorded in Vol. 5, at page 9 of deeds, and did not grant the volume of water described in the first part of the description.

The mortgage back from Chambers and Frost to Finch likewise described the water rights reserved in two ways; first, by reference to the record of the Crosby deed granting the water right; and second, by reference to the deed from Finch to Chambers and Frost, as the mortgage expressly states that the mortgaged premises are "the same premises conveyed by mortgagee and wife to the mortgagors A. H. Chambers and Robert Frost by deed bearing even date herewith." And part of this description is also erroneous as the Crosby water deed was not recorded in Vol. 5, at page 9, and the description of the water right reserved was not the same in the Crosby and Finch deeds.

Which of these inconsistent descriptions in the Finch deed, and the Chambers and Frost mortgage, is controlling? In the construction of deeds and mortgages, the object always is to ascertain the intention of the parties. If a deed or mortgage contain two descriptions, one of which is discovered to be erroneous in the light of the surrounding circumstances, the erroneous description will be rejected as surplusage and the other will control. Devlin, Deeds, § 1038; *Haley v. Amestoy*, 44 Cal. 132; *Rutherford v. Tracy*, 48 Mo. 325, 8 Am. Rep. 104; *Scull v. Pruden*, 92 N. C. 168; *Abbott v. Pike*, 33 Me. 204.

In this case, we have no doubt that, if a water right twenty inches deep, four feet seven inches wide, and flowing with a velocity of five hundred and twenty-two feet per minute, had been theretofore granted to Crosby & Company out of the premises conveyed by Finch and wife, the Finch deed would reserve a water right of that volume, and the reference to the Crosby deed and its record would be rejected as surplusage. Turning then to the Chambers and Frost mortgage, it seems apparent that the parties thereto intended to mortgage the identical premises conveyed on the same day by the Finch deed, and nothing more. Had they intended to mortgage other or different property or water rights, they certainly would not have described the mortgaged premises by reference to the Finch deed as being the same premises therein conveyed, nor by reference to the same water deed as was erroneously referred to in the Finch deed.

It must be conceded that the reference in the Finch deed to the Crosby deed as granting a volume of water twenty inches deep, four feet seven inches wide, and flowing with a velocity of five hundred and twenty-two feet per minute, was erroneous. And it must likewise be conceded that the same reference in the mortgage made at the same time, and as a part of the same transaction, was erroneous. How can it be contended that the reference to the Crosby deed was made

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advisedly in the mortgage, when it is apparent that it was made erroneously and unadvisedly in the Finch deed executed at the same time? On the other hand, it seems entirely reasonable that the reference to the Finch deed, made at the same time, for a description of the property was made advisedly and intentionally, and not otherwise. The parties are conclusively presumed to have been familiar with the contents of the Finch deed, whereas the record shows they were not familiar with the Crosby deed. The intention of the parties must control, and we can reach no other logical conclusion but that the parties intended to, and did, mortgage the identical premises conveyed by Finch, with the same reservations, and nothing beyond.

Does the respondent here occupy a stronger or better position than the original mortgagee? It claims, that it does; that it is a *bona fide* purchaser for value; that the mortgage only reserved a water right granted by a certain deed therein referred to; and that a reference to such deed only discloses a grant of a water right such as would flow through a gate one foot deep and three feet wide. We cannot agree with this contention. A party cannot rely on so much of a public record as is favorable to his contention, and close his eyes to the remainder. Assuming that the respondent examined the records before its purchase, it not only had notice of the mortgage and the Crosby water deed therein referred to, but also notice of all other instruments in the chain of title, including the deed from Finch and wife to Chambers and wife, particularly referred to in the mortgage itself. In other words, it had constructive notice of all the instruments and all the facts heretofore recited. These were ample to put it upon inquiry, and in the face of such records and such notice, the plea of *bona fide* purchaser cannot prevail.

In view of this conclusion, we do not deem it necessary to inquire into, or decide, the questions of merger or reformation, discussed in the briefs. For the reasons above stated,

the judgment of the court below is reversed, with directions to overrule the demurrer to the reply, and for further proceedings not inconsistent with this opinion.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

[No. 5318. Decided September 6, 1905.]

JOSEPH T. KREBBS, *Respondent*, v. OREGON RAILROAD & NAVIGATION COMPANY *et al.*, *Appellants*.¹

MASTER AND SERVANT—RAILROADS—OBSTRUCTION NEAR TRACK—UNNECESSARILY RIDING ON SIDE OF CAR—WIDTH OF BRIDGE—DUTY OF COMPANY. A railroad company is not liable to a brakeman, struck by a projecting bolt while riding on the side of a car when the train was passing through a bridge between stations, the proper discharge of his duties in cutting off the air from the brakes 1,600 feet or more distant from the bridge not requiring him to ride on the side of the car at that place, and the rules of the company requiring him to note the position of bridges.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered March 10, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a brakeman, riding on the side of a car, and struck by a projecting bolt in a railroad bridge. Reversed.

W. W. Cotton, L. S. Wilson, and Thos. O'Day, for appellants.

Barnes & Latimer and *Alfred M. Craven*, for respondent, contended, among other things that the appellant was bound to place its permanent structures in reference to its track so as to avoid danger. *Kelleher v. Milwaukee etc. R. Co.*, 80 Wis. 584, 50 N. W. 942; *Johnson v. St. Paul etc. R. Co.*, 43 Minn. 53, 44 N. W. 884; *Nugent v. Boston etc. R. Co.*,

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80 Me. 62, 6 Am. St. 151; *Chicago etc. R. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54; *Flanders v. Chicago etc. R. Co.*, 51 Minn. 193, 53 N. W. 544; *Whipple v. New York etc. R. Co.*, 19 R. I. 587, 61 Am. St. 796; *Fort Worth etc. R. Co. v. Graves* (Tex. Civ. App.), 21 S. W. 606; *Bryce v. Chicago etc. R. Co.*, 103 Iowa 665, 72 N. W. 780; *McDannald v. Washington etc. R. Co.*, 31 Wash. 585, 72 Pac. 481; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *Snow v. Housatonic R. Co.*, 8 Allen 441, 85 Am. Dec. 720; *Crandall v. New York etc. R. Co.*, 19 R. I. 594, 35 Atl. 307; 1 Labatt, Master & Servant, § 70, and cases cited. The train operator cannot be held to be guilty of contributory negligence unless he knows that the object is dangerously close. *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121; *Greenleaf v. Dubuque etc. R. Co.*, 33 Iowa 52; *Snow v. Housatonic R. Co.*, *supra*. The brakeman was obliged to descend the car while the train was in motion, and cannot be expected to measure the distance with exactness. *Flanders v. Chicago etc. R. Co.*, *supra*.

PER CURIAM.—On and prior to the 23d day of March, 1903, the defendant railway company owned and operated a line of railroad, between Tekoa, in the state of Washington, and Wallace, in the state of Idaho. The defendant Campbell was superintendent of the defendant railway company, and it was his duty, as such, to see that the tracks and bridges on the above section of road were properly constructed, and in reasonably safe condition and repair. The defendant Kennedy was superintendent of bridge construction for the defendant railway company, and it was his duty, as such, to see that the bridges on the above section of the road were properly constructed and repaired.

On the above date and for about two weeks prior thereto, the plaintiff was in the employ of the defendant railway company as head brakeman on a freight train running between Tekoa and Wallace. When the freight train ap-

proached the town of Wallace, it ran up the main line to a switch, some 1,600 or 2,000 feet distant from a bridge on the line of the road, near the town of Wallace, and between the bridge and the town. At this switch, the caboose and way-freight attached to the rear of the train were cut off, and allowed to drop back on the main line, and the balance of the train was run on to the side-track. The engineer then picked up the caboose and way-freight, and proceeded to the depot at Wallace, about a mile beyond. As soon as the train stopped at the switch in question, it was the duty of the plaintiff to be on hand to cut off the air, detach the caboose and way-freight, and signal the engineer.

As stated above, on the line of the road, about 1,600 or 2,000 feet before reaching the switch in question, was a bridge, about 100 feet in length and about six feet in height above the floor. The bridge was an ordinary truss bridge, fourteen feet in width, and had been in use some twelve or fourteen years. A bolt extended about three and one-half inches beyond the timbers towards the interior of the bridge, and the rails were five inches nearer this side of the bridge than the other, that is, two and one-half inches from the center of the bridge.

About ten o'clock of the night of March 23, 1903, the train whistled into Wallace and, as it did so, the plaintiff, who was in the caboose, went out on the top of the train and descended a ladder at the side of one of the freight cars to be in position to cut the air, uncouple the cars, and signal the engineer when the train stopped. As he did so, he claims he was struck by the bolt above described in the side of the bridge, and knocked from the car on to the ground, one of the wheels passing over his leg. An ordinary freight car is eight feet and two inches wide, and the ladder at the side extends three inches from the car; so that, if the rails were in the middle of the bridge, with no bolt or other obstruction, it would be two feet eight inches from the ladder to the side of the bridge. Deducting from

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this the two and one-half inches which the rails were out of place, and the three and one-half inches which the bolt protruded, leaves two feet and two inches between the ladder and the end of the bolt, assuming that the car at all times stood perpendicular on the track. The plaintiff brought this action to recover damages for the injuries received in said fall, and from the verdict and judgment in his favor, this appeal is taken.

While the respondent complained of the bolt in the interior of the bridge, and of the location of the rails on the bridge, yet the complaint and the instructions of the court would warrant a recovery if neither of these defects existed, provided, the bridge was not wide enough to permit the respondent to pass down the side of the car in safety as the train passed over the bridge. What duty did the appellants owe the respondent in the construction and maintenance of bridges, situated as this one was? Numerous cases are cited where railway companies have been held liable to employees for injuries received from section houses, depots, coal sheds, signal posts, telegraph poles, etc., situated too close to the track. These structures differ materially from railroad bridges, which constitute a permanent part of the road bed, and are of necessity part and parcel thereof.

In the case of *Fort Worth etc. R. Co. v. Graves* (Tex. Civ. App.), 21 S. W. 606, cited by the respondent, the plaintiff was climbing a ladder on the side of a box car, on a dark cold morning, in response to the usual signal, as the train passed over a bridge near Wichita Falls, and was knocked from the train by one of the stays of the bridge. The court held that the verdict of the jury, which had support in the evidence, imported a finding that the plaintiff, when injured, was in the prudent discharge of his duty, and without fault or negligence; that the accident was due to the negligence of the company; and said, "While the inference of liability rests upon a rather slender basis, we

are not prepared to hold that it was not a legitimate deduction from the facts contained in the record."

In the case of *Bryce v. Chicago etc. R. Co.*, 103 Iowa 665, 72 N. W. 780, cited by the respondent, the plaintiff was descending the side of a freight car to loosen the brakes, and was struck by the timbers of a bridge constructed much like the bridge in question. A verdict for the plaintiff was sustained. The verdicts in both cases were upheld upon the express ground that the plaintiffs were descending the side of the car as the train passed over the bridge *in the discharge of their duties*. In the last case cited, the court instructed the jury,

" . . . to take into consideration the question as to whether at that point said Lounsbury and others, as brakemen, would be required to ascend and descend cars in the discharge of their duties, while passing through the said bridge; and the mere fact that the truss was too near to admit of the passage of the plaintiff, if it was so, while riding on the ladder of the car, would not constitute negligence, unless you find that it was necessary for said Lounsbury and other brakemen, in the discharge of their duties, to be in that position, and that the ordinary use of the road at that place, and the ordinary duty of running trains, would require them to be on the side of the car while passing through the bridge."

In reference to this instruction the supreme court of Iowa said:

"The court thus clearly recognized the rule that, in determining whether placing a structure along a railroad track is negligence, the place where it is located, and the purposes for which it is or might reasonably be expected to be used, must be considered. It will not be controverted that a railroad company may erect buildings, tanks, or other structures for use in the transaction of the business as near the track as the necessity or convenience of the company and its patrons, or the economical use of the road, may require, having due regard for the safety of those operating trains. These are necessary, and, owing to their location at or near the stations, employees are constantly put on their guard.

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Nor can the railroad company be said to be negligent in permitting obstructions between stations which do not interfere in any way with the ordinary and usual operation of trains."

See, also, *Illick v. Flint etc. R. Co.*, 67 Mich. 632, 35 N. W. 708.

We are of the opinion that the correct rule is announced by the supreme court of Iowa in the case above cited. If the employees of a railroad company are required to be on the sides of its cars in the discharge of their duty, as the trains pass over bridges, it is incumbent on the company to so construct and maintain its bridges as to make them reasonably safe for such use. But if the employees are not required to be on the side of the cars at such times, the company violates no duty it owes them by failing to construct its bridges of sufficient width to permit of an employee riding on the side of a car over a bridge. Applying that rule in this case, the testimony does not warrant a recovery. The plaintiff had passed over this bridge a number of times before, knew of its location, and the rules of the company required him to note the location of all bridges. He was not required to be on the side of the car, as the train passed over this bridge, in the proper discharge of his duty. His sole duty was to be in position to cut off the air, uncouple the cars, and signal the engineer when the train stopped at the switch. The proper discharge of this duty did not necessitate or justify his presence on the side of the car at the time he received the injury complained of, and the appellant company violated no duty it owed him.

The judgment of the court below is therefore reversed, with directions to dismiss the action.

DUNBAR, J. (dissenting).—I dissent. The ladder was evidently placed on the side of the car for the use of the brakemen, and the plaintiff in the hurried discharge of his duties ought not to be held to too nice a discrimination in the time

when, or circumstances under which, he should use a particular appliance. The company was guilty of gross negligence in maintaining the bridge in a condition dangerous to its employees, and ought to respond in damages for the injuries sustained. The judgment should be affirmed.

ON PETITION FOR REHEARING.

[Decided February 26, 1906.]

PER CURIAM.—A rehearing was granted in this case on account of a change in the membership of the court after the case was originally submitted. After further consideration, we see no reason to change or modify the views expressed in the original opinion on file, and the rehearing is accordingly denied.

DUNBAR, J., (dissenting)—I dissent. I think the judgment of the lower court should be affirmed.

[No. 5534. Decided September 14, 1905.]

*In the Matter of WESTLAKE AVENUE, Seattle.*¹

CONSTITUTIONAL LAW—ENCROACHMENT ON JUDICIARY—LEGISLATIVE FUNCTIONS — MUNICIPAL CORPORATIONS — LOCAL IMPROVEMENTS — SPECIAL ASSESSMENT—COMMISSIONERS APPOINTED BY COURT. The act authorizing a city to initiate special assessments for local improvements which provides that the apportionment of the tax shall be made by commissioners appointed by the superior court subject to revision by the court, merely invokes the assistance of the court to correct errors and inequalities, the commissioners being agents of the city, and does not confer legislative powers on the court and is not obnoxious to Const., art. 7, § 9, providing that the legislature may vest in the corporate authorities of cities power to levy special assessments for local improvements.

¹Reported in 82 Pac. 279.

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Syllabus.

MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—WHAT LAW GOVERNS—PROPERTY SPECIALLY BENEFITED—CONTIGUITY. Where a proceeding to levy special assessments for a local improvement was commenced under an act restricting the levy to contiguous property, and a supplemental petition was filed after the law was changed eliminating the word "contiguous," the new law controls the proceeding, and the levy is not restricted to contiguous property.

SAME—LUMP ASSESSMENT AGAINST PORTIONS OF LOT DIVIDED BY ESTABLISHMENT OF NEW AVENUE—SEPARATE ASSESSMENT ESSENTIAL. A "lump" assessment cannot be levied upon separate portions of a lot where the parcels are separated by the new street for which the assessment is made.

SAME—ASCERTAINMENT OF BENEFITS—MATTERS TO BE CONSIDERED—SPECIAL USES—NATURAL AND REASONABLE RESULTS. In levying a special assessment the commissioners must take into consideration any special use being made of the property, or for which it was adapted, or with reasonable probability would become so in the future, as determined by natural and reasonable results, rather than fanciful anticipations.

SAME—APPORTIONMENT BETWEEN CITY AND DISTRICT SPECIALLY BENEFITED—DISCRETION OF COMMISSIONERS—ACTION CONCLUSIVE. In apportioning the amount to be borne respectively by the city as a whole, and by the benefited property, the action of the commissioners is conclusive on the courts, in the absence of fraud, mistake of fact or law, or arbitrary action amounting to an abuse of discretion.

SAME—SIZE OF ASSESSMENT DISTRICT—ASSESSMENT OF PROPERTY BENEFITED OUTSIDE OF DISTRICT—DUTY OF COMMISSIONERS—DISTRICT CREATED BY ORDINANCE—STATUTES—CONSTRUCTION. The commissioners are to determine the size of, and assess all benefited property within the assessment district, and cannot be restricted to the limits of the assessment district specified by the city council.

APPEAL—FROM CONFIRMATION OF ASSESSMENT ROLL—REVERSAL AS TO APPELLANTS—FRUITS OF APPEAL. Under Laws 1893, p. 200, § 30, the judgment on appeal from a local assessment can affect only the property of the appellants, and those who did not join in the appeal can derive no benefits therefrom.

SAME—DECISION—REMAND—COSTS. Where, on appeal from an assessment by part of the owners, the cause is reversed and a new assessment ordered as to the appellants' property and other property not assessed, the costs of the appeal should be taxed against the city, and the costs of the former and the new assessment should be charged against the property to be reassessed.

Appeal from an order of the superior court for King county, Griffin, J., entered September 12, 1904, after a hearing on the merits confirming an assessment roll made by commissioners appointed to levy a special assessment upon property specially benefited by a municipal improvement. Reversed.

Peters & Powell, Shepard & Lyter, Tucker & Hyland, Thomas T. Littell, and Piles, Donworth, Howe & Farrell, for appellants.

Scott Calhoun and Elmer E. Todd, for respondent.

Root, J.—By ordinance No. 7,733, approved February 13, 1902, the city council of the city of Seattle determined to extend and establish Westlake avenue, and created a local improvement district of property to be specially benefited thereby, said district to be assessed to pay for the property taken or damaged in establishing and extending said avenue. In accordance with this ordinance, condemnation proceedings were instituted under the city's power of eminent domain, and compensation awarded for the taking and damaging of private property thereby.

To determine the benefits to be derived, and to assess the same, the court appointed three commissioners, who returned an assessment roll December 1, 1903, which roll included the property inside, as well as considerable property lying outside, of the limits of the improvement district prescribed by the city council in said ordinance. Upon motion, the court set aside this roll, and appointed a new board of commissioners to prepare another roll. The second board was directed by the court to assess only the property contained in the improvement district established by the city ordinance aforesaid. Two of the members of the former board were appointed upon the new board with one other member. The second board returned another assessment roll covering only property within the district as described in the ordinance.

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The total amount of the assessment was \$206,000, of which about \$20,000 was assessed to the city as a whole. The total above mentioned contained an item of \$5,000, which was the estimated cost and expense incurred in preparing the first assessment roll. The improvement was intended to afford a more convenient access from the northern part of the city to the business center, and to establish an avenue upon which the commercial business of the city might readily be extended.

From the evidence of the commissioners, it appears that all of the property covered by the first assessment roll was specially benefited. It appears that most of the property included in the first roll, and much included in the second, is not property abutting upon Westlake avenue, and is not "contiguous," as that term is ordinarily understood, some of said property being nearly or quite a half a mile distant from said contemplated improvement. The assessment roll returned by the second board was, after some modifications, ratified by the superior court. From this order of confirmation, appeals are taken by several property owners affected thereby. These appeals were heard, and have been considered, together. Various contentions are made as to the asserted illegality of said order and the proceedings leading up thereto.

Constitutionality.—First, it is submitted that the statute under which the assessment was made is unconstitutional, in that it assumes to authorize an assessment by the court. Art. 7, § 9 of our constitution, provides:

"The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited."

It is contended that this authority vests in the city the power to make such assessments, and that said power cannot be delegated to a court.

“While statutes authorizing courts to assess taxes are generally unconstitutional, yet those authorizing the exercise of a certain supervision and also the assessment of certain taxes are often regarded as valid.” 8 Cyc. 836 B.

The city, and not the court, is authorized to take the initiative in the matter of such improvements and the assessments to pay therefor. It was the legislative power of the city, exercised by its council, that occasioned the imposition of the assessment. The state legislature gave the city the authority to levy such a tax. It provided the method by which it should be done. By this plan, the apportionment of the tax to the various parcels of property is made by a board of commissioners appointed by the court. These commissioners, by operation of law, become, in effect, officials or agents of the municipality for the performance of this service. Upon the completion of the commissioners' work, it may be called in question by any interested person before the court, which is vested with revisory powers. The function of the court in these proceedings is to settle disputes and to correct errors and inequalities called to its attention, and thereby relieve the assessment of any lack of uniformity or other injustice. That the act of the legislature invokes the assistance of the court to obviate errors in, and facilitate the accomplishment of, a special assessment, does not, in our opinion, render the statute obnoxious to the constitution. *Lake v. Decatur*, 91 Ill. 596; *Cooley, Taxation*, pp. 47, 48, 313, 314, 364; *State ex rel. Mayor v. Ensign*, 54 Minn. 372, 56 N. W. 1006; *Bauman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270. We may observe, however, that we think the statute in question goes as far as permissible in the direction of imposing upon the judiciary legislative functions.

It is urged that much property not “contiguous” to the improvement is assessed. This proceeding was commenced under the provisions of the act of 1893. While § 19 of said statute would seem to restrict the assessment to “con-

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tiguous" property benefited, it is questionable whether the act, construed as a whole, should be given that effect. There is also much doubt as to whether the term "contiguous," as used in the statute, should be given the literal meaning which its derivation might suggest, and which some of appellants insist upon. Authority is not wanting for an interpretation giving this term, as employed in statutes of this character, a more comprehensive meaning. However, we do not regard a determination of either of these questions essential in this case. Before the supplementary petition herein was filed, and before assessment for this improvement was apportioned or confirmed, the legislature amended said § 19 by eliminating therefrom the word "contiguous." Laws 1903, p. 24. No valid reason is shown why the new law should not be controlling in this proceeding. Consequently, the assessment could be legally apportioned upon the property benefited, regardless of whether or not it was contiguous. *Spokane v. Broune*, 8 Wash. 317, 36 Pac. 26; *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367; *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393.

Error is assigned by one appellant upon the action of the court in sustaining a "lump" assessment against two entirely separate portions of a certain lot, these parcels being separated by the width of the new avenue. We think this assignment well taken. While these tracts were formerly portions of the same lot, the laying out of the new avenue, pursuant to the condemnation proceedings, terminated the entity of said lot, and left the untaken portions as separate and distinct parcels. The tax for the benefits accruing to each of these should have been assessed thereupon separately.

Objection is made that the commissioners, in estimating the benefits to be assessed upon certain property, did not take into consideration the special use being made of said property and for which it was well adapted for the future. It was the duty of the commissioners to regard this special use and to consider any and all uses being made of property

or for which the property was, or would naturally, and with reasonable probability become, suitably adapted. In the light of all these facts and the character and extent of the improvement, it was for the commissioners to say how much such property was benefited.

Contention is made that the commissioners, in apportioning benefits, took into consideration matters remote, speculative, vague and conjectural, which they thought might exist in the future. It was the duty of the commissioners, having regard for the present use, character, and value of each parcel of property, to consider what benefits now accrued to said property by reason of those results naturally and reasonably to be expected as concomitants of the changed condition occasioned by the improvement in question. Probable and logical sequences, rather than fanciful and visionary anticipations, must guide the action of the commissioners in estimating such benefits. Lewis, *Eminent Domain* (2d ed.), § 478, uses the following language:

“In estimating the value of property taken for public use it is the market value of the property which is to be considered. The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities of the property, and all the uses to which it may be applied or for which it is adapted, are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner. It is not a question of the value of the property to the owner. Nor can the damages be enhanced by his unwillingness to sell. On the other hand, the damages cannot be measured by the value of the property to the party condemning it, nor by its need of the particular property. All the facts as to the condition of the property and its surroundings, its improvements and capabilities, may be shown and considered in estimating its value. Of course circumstances and conditions tending to depreciate the property are as competent as those which are favorable.”

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In *Kankakee Stone & Lime Co. v. Kankakee*, 128 Ill. 173, 20 N. E. 670, the supreme court of Illinois said that, in making the assessment, the question was: "What will the influence of the proposed improvement be upon the market value of the property claimed to be benefited thereby?" In the case of *Seattle etc. R. Co. v. Murphine*, 4 Wash. 448, 30 Pac. 720, this court, speaking by Anders, C. J., said:

"The market value of property is its value for any use to which it may be adapted, and in estimating its value all the uses of which the property is susceptible should be considered, and not merely the condition in which it may be at the time and the use to which it may have been put by the owner."

The supreme court of the United States, speaking through Mr. Justice Field, in *Boom Co. v. Patterson*, 98 U. S. 403, said:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. . . . So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

See, also, Cooley, *Taxation* (3d ed.), p. 1234; *Friedenwald v. Baltimore*, 74 Md. 116, 21 Atl. 555.

Much stress is laid upon the contention that the improvement in question was of general benefit to the city at large

and not confined in its beneficial effects to the property assessed—at least, not to the extent indicated by the proportion of the cost levied upon the property in said district. The statute expressly enjoins upon the commissioners the duty of apportioning the total cost between the city and the district specially benefited in such proportion as shall be relatively equitable. If, however, they fail to do this, the power of the court to review their action is restricted. This statute was borrowed almost literally from that of Illinois. The supreme court of that state has held that the action of the commissioners in determining what portion should be assessed to the city and what portion to the property specially benefited, cannot be inquired into by the court when the roll comes before it for confirmation. *Bigelow v. Chicago*, 90 Ill. 49; *Fagan v. Chicago*, 84 Ill. 227. These decisions were prior to the adoption of the statute by us. A rule frequently invoked is that a borrowed statute should be given the construction placed upon it by the courts of the state from whence it comes. We think, therefore, that the action of the commissioners, in apportioning the amounts to be borne respectively by the city as a whole and by the property specially benefited, is conclusive, in the absence of fraud, mistake (of fact or law, but not in matters of opinion), or arbitrary action amounting to a manifest abuse of discretion. The same may be said as to the size of the district, and the quantity of property covered by the assessment roll which it returns.

It is also urged that the court had no right to restrict the assessment to the property embraced in the improvement district prescribed by the city ordinance, but that the same should have been made upon, and apportioned to, all property benefited—regardless of whether the same was within, or without, the district designated by the ordinance. These proceedings were had under the act of March 9, 1893 (Laws 1893, p. 189.). This statute does not provide for the creation of any assessment district, nor does it say, expressly, what authority shall determine how much or what property

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is benefited. It does, however, provide that all the property benefited shall be assessed by the board of commissioners appointed by the court.

In the case at bar, the city council, in its ordinance, created an assessment district and recited that the property therein was specially benefited and should be assessed. It did not, however, recite that the property covered by said district was all of the property specially benefited by the improvement. The statute requires the commissioners to take an oath of office before entering upon the discharge of their duties. That oath is as follows:

"State of Washington, County of _____, ss.

"We, the undersigned commissioners appointed by the superior court of _____ county, State of Washington, to assess the cost of _____ (here state in general terms the improvement), do solemnly swear (or affirm, as the case may be) that we will a true and impartial assessment make of the cost of said improvement upon the city of _____ and the property benefited by such improvement, to the best of our ability and according to law." Laws 1893, p. 196, §21.

A portion of § 22 of said statute reads thus:

"It shall be the duty of such commissioners to examine the locality where the improvement is proposed to be made, and the lots, blocks, tracts and parcels of land that will be specially benefited thereby, and to estimate what proportion of the total cost of such improvements will be of benefit to the public and what proportion thereof will be of benefit to the property to be benefited, and apportion the same between the city and such property, so that each shall bear its relative equitable proportion; and having found said amounts, to apportion and assess the amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land in the proportion in which they will be severally benefited by such improvement." Laws 1893, p. 196, § 22.

It would seem, from necessary implication, that the duty of determining the amount of property benefited was, by this statute, imposed upon the commissioners. They are charged expressly with the duty of apportioning the assess-

ment equitably as between the city and the property specially benefited; and, as to the latter, they are required to apportion and assess the amount of the tax to the parcels benefited so that each shall bear its proportionate share according to benefits. It will thus be seen that the commissioners must be fully advised of all the property benefited, and of the amount of benefit accruing to the city as a whole, and to each parcel of property involved. They must have this knowledge before levying the assessment. No provision is made in the statute for furnishing them this information. It would seem to have been the intention of the lawmakers that the commissioners should themselves ascertain what property was benefited as well as the extent of the benefit. The language of the statute seems to naturally imply this. There is nothing authorizing the council or any other authority (than the commissioners) to ascertain the extent of the district benefited. The statute makes it the duty of the commissioners to examine the "locality" of the proposed improvement and the property "specially benefited." From this it would seem that the "locality" and the "property specially benefited" were not necessarily the same.

If it were the intention of the legislature that the assessment of benefits should be confined to the district created by the city council, there would be no occasion for the commissioners to examine the "locality" other than the particular parcels included in the district defined by the ordinance. That portion of the statute requiring an examination of the locality would be surplusage if it be held that the city council, instead of the commissioners, determines what property is benefited, and establishes the assessment district. Language in a statute will not be construed as needless and surplusage if a legal and reasonable interpretation of the statute is permissible, that would give effect to said language.

It appears to be the practice in Illinois for the commissioners to designate what property is benefited and to be assessed. *Bigelow v. Chicago*, 90 Ill. 49 (see page 55).

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Under a similar statute, the court of appeals of New York, in the case of *People ex rel Lehigh Val. R. Co. v. Buffalo*, 147 N. Y. 675, 42 N. E. 344, held that it was the duty of the commissioners, and not the city council, to determine the size of the district to be assessed. The court said:

“The claim that the district of assessment should have been fixed by the common council, and not by the assessors, depends upon the provisions of the charter. It was competent for the legislature to prescribe the public agency to which this power should be committed. It could have imposed this duty upon the common council, or on a board of commissioners, or on the assessors. *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682. The charter does not in direct terms declare that the assessors are to determine the district of assessment. But we think this is the clear implication from its provisions. By section 405 of the charter (chapter 105, Laws 1891), the city is authorized to dredge, deepen, and maintain the Buffalo river, and to defray the expense out of the general fund, or by local assessment. Section 143 provides that the common council shall estimate and fix the amount of money to be raised by local assessment. There is no provision that the common council shall fix the assessment district. In the absence of any indication that the assessors or other body should possess this power, it might very well be that it would reside with the common council, under the grant of legislative power. But section 145 declares that the board of assessors shall assess the amount ordered to be assessed for local improvements upon the parcels of land benefited by the work, act, or improvement in proportion to such benefit. The common council under the charter are to determine what local improvements shall be made, and the amount to be locally assessed therefor. But the clear implication from section 145, in the absence of any other charter provision on the subject, is that the assessors are both to fix the district of assessment and distribute the tax.”

It appears that the first assessment roll was vacated and set aside by the court upon the ground that the commissioners had assessed property situated outside of the boundaries of the assessment district created by the ordinance. This

was error. All the property which the commissioners found to be benefited by the improvement was properly included in an assessment roll. The action of the court in appointing a new board, with directions to assess only the property included within the limits of the district defined in the ordinance, was erroneous, and the assessment, as returned in the second roll, illegal and voidable.

As the judgment appealed from, in so far as it affects the property of these appellants, must be reversed, a question arises as to what proceedings should be taken looking to a new assessment. Section 27 of the statute provides that, where objections are not filed within the time ordered by the court, "default may be entered and the assessment confirmed by the court." A portion of § 30 reads as follows:

"The judgment of the court shall have the effect of a separate judgment as to each tract or parcel of land assessed, and any appeal from such judgment shall not invalidate or delay the judgment except as to the property concerning which the appeal is taken." Laws 1893, p. 200, § 30.

From this provision it appears that the action of this court can affect only the property of appellants; and that those property owners who did not appeal cannot share in the fruits of success with those who bore the burden of the appeal against the illegal assessment.

The judgment, in so far as it affects the property of appellants, is reversed, and the case is remanded to the honorable superior court with the following instructions: Said court shall appoint a board of commissioners. Said commissioners shall ascertain how much real estate is specially benefited. They shall prepare an assessment roll comprising the property on account of which these appeals were taken, together with all property specially benefited and lying outside of the district heretofore assessed. The costs of this appeal shall be assessed against the city as a whole. All of the expenses of the former proceedings and assessments and the one now ordered to be made, and the probable further

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Statement of Case.

costs of the proceeding, and the estimated costs of making and collecting such assessment, shall constitute an amount which—excepting what is already assessed against the city and upon property the owners of which did not appeal—shall be apportioned and assessed upon the various parcels of real estate to be described in said roll, in the proportion in which they will be severally benefited by such improvement. Had the appeal been taken by the owners of all the property assessed, a different disposition would probably have been made as to the expense of the former proceedings and assessments.

MOUNT, C. J., FULLERTON, HADLEY, CROW, DUNBAR, and RUDKIN, JJ., concur.

[No. 5549. Decided September 15, 1905.]

LORENZ NEHER, *Respondent*, v. WESTERN ASSURANCE COMPANY, *Appellant*.¹

INSURANCE—CONDITIONS AS TO INCUMBRANCE—VIOLATION—EFFECT—ORAL APPLICATION—REPRESENTATIONS. A policy of fire insurance upon personal property subject to chattel mortgages duly recorded, is not avoided by a condition that the same shall be void if the property is incumbered by chattel mortgage, where the policy was written upon an oral application and no representations were made as to the condition of the property, and the insured did not know that the policy afterwards sent to him contained the condition in question (Root and Crow, JJ., dissenting).

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered September 12, 1904, upon findings in favor of the plaintiff after a trial before the court without a jury upon stipulated facts, in an action on a policy of insurance. Affirmed.

H. T. Granger, for appellant.

Dorr & Hadley, for respondent.

¹Reported in 82 Pac. 166.

FULLERTON, J.—Respondent, being the owner and in possession of certain personal property covered by two certain chattel mortgages, aggregating \$1,600, each of which were properly recorded, applied to appellant's agent for insurance upon the property against loss by fire. The agent acting in behalf of the appellant agreed to insure the same against direct loss by fire, in a sum equal to its value, but not exceeding \$1,600, for a term commencing at noon on June 23, 1903, and terminating at noon on June 23, 1904, for a consideration of \$21.60. The consideration was paid, and later on a policy was sent the respondent from the appellant's office containing, among other conditions, a condition in the following words: "This entire policy . . . shall be void . . . if the subject of insurance be personal property and be or become incumbered by chattel mortgage." The property was in value greatly in excess of \$1,600, and was destroyed by fire during the period covered by the contract of insurance. Payment for the loss was demanded by respondent, and refused by appellant on the ground that the contract of insurance was void by reason of the stipulation in the policy above quoted.

The application for insurance was made orally, and no representations of any kind as to the condition of the property were made by the applicant; the appellant relying for its information as to the condition of the property entirely upon the representations of its own agents. The respondent was not informed that the appellant refused to issue insurance on personal property covered by mortgage, nor did he learn, until after his property was destroyed, that the policy issued to him contained any condition to that effect. The appellant had no actual notice of the mortgages until after the destruction of the property by fire. These facts were stipulated by the parties, and the trial court decided thereon that the respondent was entitled to recover the full sum named in the contract of insurance, and entered a judgment accordingly.

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The judgment was right. In *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507, 58 Am. St. 26, the policy contained a condition to the effect that it should be void if the interest of the insured in the property covered by the policy be other than unconditional or sole ownership. The interest of the insured in the property was less than unconditional and sole ownership; and, on the destruction of the property by fire, the insurance company sought to avoid payment of the loss on that ground. The court held that, inasmuch as the application was an oral one, and no misrepresentations were made concerning the insured's title to the property, his right to recover was not barred by this clause of the policy. In the course of the argument the court said:

"There having been no written application in which questions were asked and answered concerning the status of the property, we think, under the authorities and as a question of right, that this condition which is injected into the policy, among numerous other conditions more or less technical and hard to understand by the ordinary mind, ought not to prevent a recovery, in the absence of any misrepresentation on the part of the insured. The insured, as a matter of fact, ordinarily knows nothing about the policy until it is made out and returned to him after the payments for the same have been made to the agent at the time the contract was made, and the insurer, having failed to obtain this information, must be held to have done so at its peril."

To the same effect are the cases of *Pioneer Sav. & Loan Co. v. Providence Wash. Ins. Co.*, 17 Wash. 175, 49 Pac. 231, 38 L. R. A. 397, and *Burrows v. McCalley*, 17 Wash. 269, 49 Pac. 508. These cases cannot be distinguished in principle from the case at bar, and authorize the judgment entered therein.

The judgment is affirmed.

MOUNT, C. J., DUNBAR, and HADLEY, JJ. concur.

Root, J. (dissenting)—I am unable to concur in the conclusion reached by the majority of the court. Respondent bases his action upon the policy which he received. He alleges said policy to be his contract with the insurance company. If it is, it necessarily follows that he is bound by its terms. Said policy either is, or is not, the contract of insurance entered into by and between appellant and respondent. If it is the contract, it is binding upon both of them. If it is not said contract, then respondent cannot maintain this action upon it. He ought not to be heard to say that it is the contract for one purpose and not the contract for another purpose. The law, ordinarily, does not permit a party to "blow both hot and cold." If appellant did not give respondent a policy in accordance with the agreement, if any, which they made for insurance, then respondent should sue on the agreement, not on this policy. However, there is no allegation of any agreement or contract for insurance except this policy.

Respondent is a business man. If a policy holder were an infant, or feeble minded person, or woman unaccustomed to business matters, there might be some excuse for not holding him or her to the terms of the contract, the policy. But why a court should put a business man of ordinary intelligence in the category of weaklings for whom the law must act as guardian, I am unable to understand. A party, legally capable of making a written contract, who becomes a party thereto, is presumed by law to know its contents. Can this court suppose that a business man of ordinary intelligence would not know that his policy contained the provisions spoken of? It was his legal duty to read his policy—to know what it contained. What are written contracts for? If a party may escape the obligations of one kind of a written contract, to which he is a party, by saying he never read it and didn't know its contents, why may he not likewise escape the binding force of any written contract? Let it be remembered that this is not a case of "overreaching." No fraud, deception or sharp practices are alleged. The policy

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is in the usual form. It was delivered to respondent. He had it in his possession from date of issue until the fire, about two weeks. It was the only contract of insurance existing between them. If respondent did not read it, appellant is certainly not to blame for such neglect. Respondent gets the policy and, by keeping it without any protest, justifies appellant in supposing that it was satisfactory. It seems to me that his conduct constituted a legal acceptance of the policy. Were it a written contract with anybody other than an insurance (or kindred) company, how would respondent's attempt to avoid its terms be regarded? There being an absence of fraud, deception, misrepresentation, and "overreaching," it is not apparent why this case should not be controlled by principles applicable to written contracts.

This court has frequently held, even in cases of actual misrepresentation, that a party defrauded would not be given relief where he might have protected himself by the use of his natural faculties. *Hulet v. Achey*, 39 Wash. 91, 80 Pac. 1105; *Washington Cent. Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117. In *Washington Cent. Imp. Co. v. Newlands*, *supra*, this court, among other things, said:

"If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representations of other people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind."

This extract was quoted with approval in three of the other cases just cited. I think it still good law. But I see no way of reconciling the doctrine of those cases with that announced in the majority opinion herein. Here, a mere reading of the policy would have informed respondent all about its terms,

and nobody prevented him from reading it. It was simply neglect on his part. To allow him to recover is, in my opinion, to recognize a proposition at variance with well established principles of law.

CROW, J. (dissenting)—I concur in the foregoing dissent on the grounds therein stated, and on the further ground that respondent did not have an insurable interest in the property destroyed, to the full amount of his policy. It is a well established rule of insurance law in this country that the insured must have an insurable interest in the property sought to be protected by his policy, and this interest should certainly equal the face value of such policy. 16 Am. & Eng. Ency. Law (2d ed.), 845, 846.

In this case, the loss, which was a total one, amounted on respondent's own estimate to only \$2,504.00, while the chattel mortgage of which the company was not advised amounted to \$1,600 and interest. This left respondent, at the outside, an insurable interest of only \$904, whereas the policy was written for \$1,600. Were any fraud whatever to be presumed, it must have been on the part of respondent, in placing a policy of \$1,600 on property in which he knew he had an equity of only \$904. To permit any recovery whatever under such circumstances, to say nothing of a recovery of the full face of the policy had here, is to place a premium upon fraud on the part of an assured, instead of preventing any unfair advantage being taken of him by the company, as seems to have been implied in the majority opinion.

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Syllabus.

[No. 5614. Decided September 15, 1905.]

J. E. REYNOLDS, *Respondent*, v. GREAT NORTHERN RAILWAY
COMPANY, *Appellant*.¹

CARRIERS — LIVESTOCK — DUTY TO UNLOAD FOR REST, FOOD AND WATER—CONFINEMENT FOR 28 CONSECUTIVE HOURS—VIOLATION OF FEDERAL STATUTE—NEGLIGENCE PER SE—PLEADING—COMPLAINT—SUFFICIENCY. The confinement, by a common carrier, of livestock for more than twenty-eight consecutive hours without unloading for rest, food or water, in violation of the Federal statute, where the shipment is from one state to another, is negligence *per se*, and a complaint for damages therefor need only allege the violation of the statute and the resulting injury.

APPEAL AND ERROR—REVIEW—HARMLESS ERROR. Errors in ruling on the findings are harmless in actions triable *de novo* on appeal.

CARRIERS — LIVESTOCK — INTERSTATE SHIPMENT — CONTRACT — EXEMPTING FROM STATUTORY LIABILITY—VALIDITY. A provision in a contract for the carriage of livestock, exempting the carrier from liability for loss sustained through the violation of a statutory duty, is void.

CARRIERS—LIVESTOCK—CONTRACT REQUIRING SHIPPER TO UNLOAD FOR REST—CONSTRUCTION—VIOLATION OF STATUTORY DUTY. A provision in a contract for the carriage of livestock requiring the shipper to load and unload the stock at his own expense at any place where the same may be unloaded, does not release the carrier from liability for damages by reason of its breach of duty to unload for rest, food and water, as required by the Federal statute.

CARRIERS—LIVESTOCK—DELIVERY—DUTY TO PROVIDE SUITABLE ENCLOSURES. A carrier owes the duty to deliver stock to the consignee in or through inclosed lots or yards, and is liable for loss due to the scattering of stock unloaded without the usual and proper facilities.

SAME—KNOWLEDGE OF SHIPPER—CONTRACT—CONSTRUCTION. Where the shipper did not know that there were no proper facilities for unloading stock at the destination, the contract must be construed with reference to unloading where there were usual facilities.

SAME—PRESENTING CLAIM FOR DAMAGES—WHEN IN TIME—PROVISIONS OF SHIPPING CONTRACT. A claim for a loss on the shipment of livestock, required by the shipping contract to be made within ten days, is in due time, where, upon stating the claim within two days

¹Reported in 82 Pac. 161.

after the loss, the plaintiff was referred to other agents, who finally requested that he write a letter, which he did without delay, stating the claim as fully as it was then known, all within two weeks of the loss.

SAME. A statement in such claim that thirty-five head of cattle (which were turned loose and strayed at the place of destination) are still lost, for which he had offered \$2 per head, is sufficient on which to base a claim for depreciation in value by reason of the straying of the lost cattle.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered December 3, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover for damages to livestock, shipped on defendant's railroad. Affirmed.

M. J. Gordon and Charles A. Murray, for appellant.

Merritt & Merritt, for respondent.

MOUNT, C. J.—This action was begun by respondent to recover damages for loss of certain livestock shipped from Heppner, Oregon, to Marian, Montana. The complaint alleges, in substance, that the plaintiff loaded twelve cars with cattle at Heppner Station, in Oregon, to be transported to Marian, Montana; that the cattle were loaded on the cars of the Oregon Railroad & Navigation Company at 8 o'clock, a. m., on the 18th day of May, 1903, and were transported over the line of the said railway to Spokane, Washington, where they arrived at 11 o'clock, a. m., on the same day; that said cattle were thereupon transferred and received by the appellant, and were forwarded by it on its line at 1:30 o'clock, a. m., on the 19th day of May, 1903, and arrived at the station at Marian, Montana, at 9 o'clock, p. m., of the 19th day of May; that the said cattle were not being carried in cars where they could have proper food, water, space, and opportunity to rest; that they were confined in said cars for a longer period than twenty-eight consecutive hours without unloading for rest, water, and food; that appellant was not prevented from unloading said cattle by

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storms or other accidental causes; and that by reason of the long delay and said cattle being confined in said cars, they became run down and eighteen of them, of the value of \$490, died.

The complaint further alleged, that, at the time the cattle arrived at Marian it was a dark night, there were no stock pens or any other appliances necessary or in which said cattle could be confined and kept, and by reason of the darkness of the night, it was impossible for respondent to confine said cattle in any inclosure; that said cattle wandered away and became scattered and lost throughout the country surrounding said town, and that respondent incurred an expense of \$145 in collecting them together again; and that a part of said cattle so scattered and lost could not be found for a long time, and they depreciated in value in the sum of \$106. Respondent claimed damages in the sum of \$741.

Appellant interposed a demurrer to the complaint, which was overruled by the court. Appellant thereupon answered, admitting shipment of the cattle, but alleging that it had no knowledge of the hour when they were shipped from Heppner, and that said cattle arrived at Marian at 8:25 o'clock, p. m., on the 19th day of May, 1903; and denying the other allegations of the complaint. The answer alleged affirmatively that the cattle were delivered to the Oregon Railroad & Navigation Company under the terms and conditions of a contract in writing, signed and entered into between the respondent and the railroad company, as follows:

"The Oregon Railroad and Navigation Company. (Original) Limited Liability Livestock Contract No. 34. (Read this Contract.)

"Heppner, Oregon, Station, May 18th, 1903.

"This agreement, made this 18th day of May, 1903, by and between the Oregon Railroad & Navigation Company, hereinafter called the carrier, and J. E. Reynolds, of Heppner, hereinafter called the shipper.

“Witnesseth: That the said shipper has delivered to the said carrier 12 cars of cattle consigned to J. E. Reynolds, at Marian, Montana, destination, via Spokane, to be transported upon the conditions hereinafter set forth, over the line of the Oregon Railroad & Navigation Company, to Spokane, and there delivered to the consignee, owner or order; or to such company or carrier (if the stock is to be forwarded beyond said station) whose line may be considered a part of the route to destination, it being understood that in and about the delivery of said stock to such connecting carrier the Oregon Railroad & Navigation Company acts only as agent for the consignee or owner, and that the liability of each carrier hereunder shall cease and terminate upon delivery of said stock to the next connecting carrier, the consignee or owner.

“It is expressly agreed that this contract and the responsibility of all the carriers over whose lines the shipment may pass is limited and controlled by the conditions herein contained, which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable. It is further agreed and understood that the person delivering to this company the shipment or any part thereof described herein is authorized to sign this contract for and on behalf of the shipper, with full power in the premises.

“NOTICE. Blooded animals, or animals deemed especially valuable, will be carried only on special contract, and railroad agents are not allowed to receive and ship such animals until a proper contract is made between the owner or consignor and the railroad company or its duly authorized agent.

“Men only, in charge of stock, may accompany the same upon the rules and regulations set forth in circulars issued by the railroad company, and upon executing the release of liability printed on the back hereof.

“Agents of the railroad company are expressly forbidden to contract for delivery of livestock at any specified time, or for any particular market; and no agent of any carrier may under any circumstances alter, change, or modify or agree to alter, change or modify any of the terms of this contract. Special contracts can only be made by the general freight agent, with whom the agent, upon request of the shipper, will communicate by wire. This document must

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be presented without alteration or erasure. Said shipper for himself, the consignee or owner, agrees to pay or guarantee the freight thereon at the rate of \$.... tariff . . . per standard car of 29 to 30½ feet in length, (subject to established per cent decrease or increase applicable to cars of less or greater length) or \$.... per hundred pounds, (subject to established minima for cars of varying lengths) as shown by limited liability tariffs governing, which rate is less than the regular tariff rate for the transportation of livestock at carrier's risk, and is given said shipper at his special request, in part consideration of his agreement to the limitation of the liability of the railroad company as a common carrier upon the terms and conditions herein set forth, which are accepted and agreed to by the shipper as just and reasonable; it being understood that each and every condition of this agreement shall inure to the benefit of each and every carrier over whose line said stock may pass under this contract.

"In consideration of the special reduced rate herein provided for the transportation of the livestock above described, it is hereby stipulated and agreed as follows:

"(1) The carriers shall not be liable for the loss or death of or for any injuries received by any of said stock unless the same is the direct result of wilful misconduct or actual negligence of said carriers, their agents, servants or employees.

"(2) It is expressly agreed that the value of the livestock to be transported under this contract does not exceed the following mentioned sums, to wit: Horses, mules and jacks, not exceeding \$100 per head; oxen, bulls or steers, not exceeding \$50 per head; cows, not exceeding \$30 per head; hogs or calves, not exceeding \$10 per head; sheep or lambs, not exceeding \$3 per head; and in no event shall the carriers' liability exceed \$1,000 upon any carload, such valuation being those whereon the rate of compensation to said carriers for their services and risk connected with the transportation of said livestock is based.

"(3) The shipper agrees to load and reload all said stock at his own expense and risk, and to feed, water and tend the same at his own expense and risk while it is in any stockyards, whether the same be operated, owned or controlled by said carriers or otherwise, and while on the cars

or at feeding points, or at any place where the same may be unloaded for any purpose whatever.

"(4) The shipper assumes the exclusive duty of properly and securely fastening said stock in the cars and of removing them therefrom, and of keeping such cars, and any inclosure in which said stock may be confined, securely locked or fastened so as to prevent escape of stock therefrom. The shipper agrees to inspect the cars in which said stock is to be transported, and any yards or inclosures on the premises of the railroad company into which said stock may be unloaded and satisfy himself that they are sufficient and safe and in proper order and condition; and shall report to the agent or employees of said carrier any visible defects therein, and demand necessary repairs, before proceeding to occupy said cars or inclosures, and the fact of his loading said stock into said cars or occupying said inclosures shall be an acknowledgement and acceptance by him of the sufficiency and suitability in every respect of said cars and inclosures for the shipment and yarding thereof; and he hereby assumes all risk of injury which said livestock or any of them may receive in consequence of any of them being wild, unruly, weak, maiming each other or themselves; by or in any consequence of heat or suffocation, or any other ill effects of being crowded or injured; by the burning of straw, hay or other material loaded with or used for feeding the stock or otherwise; and also all risk of damage which may be sustained by reason of delay in transportation, and all risk of escape of any portion of said stock; or loss or damage from any other cause or thing not resulting from the wilful negligence of the carriers, their officers, agents or employees.

"(5) If the carriers, or any of them, shall furnish any laborers to assist in loading or unloading said stock at any point, no additional charge being made therefor, such laborer or laborers shall while so engaged be deemed exclusively the employees of the shipper, and no carrier shall in any event be liable for any act or thing done or omitted to be done by such laborer or laborers in connection with said stock while so engaged.

"(6) If the car or cars wherein said stock is to be transported shall be furnished by the shipper and tendered to the carrier for that purpose, said shipper assumes all

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risk for, in and about said car or cars, and no liability or responsibility shall attach to any carrier or carriers under this contract arising from or growing out of any insufficiency or defect in the condition of any such car or cars.

"(7) No carrier shall be liable for any loss or damage to said stock by causes beyond its control, by floods, fire, quarantine, disease, riots, strikes, or stoppage of labor, shrinkage in weight, changes in weather, heat, cold, or any other cause not directly the result of gross negligence on the part of said carriers, their agents and servants.

"(8) The shipper expressly agrees to load, unload and care for said stock while upon the cars or premises of the carriers in a careful and humane manner, in strict compliance with the laws of the United States and of each and every state through which said stock may be transported.

"(9) Unless claims for loss, damage or detention are presented within ten days from the date of the unloading of said stock at destination, and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability. Any carrier liable on account of loss or damage to any of said stock shall have the benefit of any insurance that may have been effected thereupon.

"(10) The rules, regulations and conditions prescribed by the carriers for the transportation of livestock as evidenced by their published tariffs, classifications and circulars in force and effect, are binding upon the shipper. The signing of this contract by the shipper or his agent shall be conclusive evidence of knowledge, assent and agreement to each and every stipulation and condition thereof by said shipper.

"Witness my hand, J. E. Reynolds, Shipper.

"The Oregon Railroad & Navigation Company, by J. M. Kernan, Station Agent."

The answer further alleged that said shipment was received by appellant from the Oregon Railroad & Navigation Company at Spokane, on the 19th day of May, 1903, and was transported from Spokane to Marian with all possible dispatch without any misconduct or negligence on the part of defendant, its agents, servants, or employees, and

that said cattle were, at said station of Marian, delivered to the respondent on the 19th day of May, 1903, at 8 o'clock, p. m., mountain time, and were there and then received by him, and no claim for loss or damage or detention was presented by the plaintiff within ten days from said 19th day of May, 1903, nor before said stock was mingled with other stock; and alleged that any claim for loss or damage to, or detention of, said stock had been waived by the respondent, and was barred by the terms and conditions of said contract.

To this answer the respondent replied, alleging, among other things, that he had no knowledge or information sufficient to enable him to form a belief as to whether or not said cattle were received for shipment and transportation by said railroad company under and according to the terms and provisions of the contract set out in the second paragraph of said affirmative defense, and therefore denies all that portion of said paragraph relating to said contract; and alleging the fact to be that whatever contract was signed by said respondent was signed for the purpose of getting said cattle transported, and without any knowledge or information on the part of the respondent as to the contents of the said contract, or any of the provisions therein contained. Respondent also, by a further and affirmative reply, alleged, that when he signed the contract he did so without knowledge of its contents or conditions; that, if he signed said contract at Heppner, the cattle were not received by appellant and transported upon the conditions of said contract, but that at Spokane a new contract was made with appellant, the contents of which were unknown to respondent; that, if respondent made said contract with the Oregon Railroad & Navigation Company, containing provisions that he should present any claim for loss within ten days, said condition was unreasonable and unenforcible and was contained in the contract without his knowledge; that, if said contract contained any condition or provision that he should

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assume all risk of damage by delay, such a condition was unreasonable and unenforcible; that, in the transportation of said cattle, they were delayed for a period of more than twenty-eight consecutive hours without unloading for rest, water, and feeding, and that appellant was not prevented from unloading said cattle by storms or other accidental causes, and that said cattle did not have proper room and space for feeding and rest in the cars, contrary to the laws of the United States of America; that a great deal of time was consumed between Spokane and Marian by the cars in which the cattle were contained being detained upon sidetracks; that, after said cattle were unloaded at Marian, said respondent was delayed for a period of ten days in gathering the cattle together, because they were unloaded upon the open prairie; that, as soon as it was possible for respondent after the said cattle were found, he presented himself to the agent of the railroad company at Marian and was by said agent directed to present the matter to the agent of the company at the city of Spokane, whereupon he proceeded to the city of Spokane and informed the agent Jackson of his losses, and that they were to the extent of \$1,000; that said agent Jackson advised him to proceed to his home and write a letter as to the amount of his losses; that thereafter, on the 2d day of June, 1903, in pursuance of said instructions from said agent Jackson, respondent did write a letter in which he informed said Jackson that his losses and damages were \$1,000; that the actual loss on account of cattle that had died was \$490; that, subsequent to the time of writing said letter, he found nearly all of the cattle; and that, at the time when found, they had depreciated in value.

Appellant filed a motion to strike out certain portions of the reply of the respondent on the ground that the matter contained therein was sham, frivolous, and irrelevant. This motion was denied. Thereupon the case was set for trial, and by consent of the parties was tried to the court

without a jury. At the conclusion of the trial, the court made findings in favor of the respondent, and entered a judgment in his favor for the full amount prayed for in the complaint.

It is unnecessary to set out the findings in this opinion. Appellant first contends that the complaint is not sufficient because it is not alleged that twenty-eight hours is an unreasonable time to confine cattle in transit without unloading said cattle for rest, water, and food; and that it is not shown that there was any unnecessary delay or that there was any reason stated why appellant should have unloaded the cattle for rest, water, and food, or that appellant was negligent in any manner. The Federal statute, found at § 4386, U. S. Rev. Stats., makes it the duty of railways carrying cattle from one state to another to unload such cattle, after confinement for a period of twenty-eight consecutive hours, for rest, food, and water, unless prevented from so unloading by a storm or other accidental causes.

“And although a penalty is imposed for a violation of this regulation, nevertheless a failure to comply therewith is negligence *per se*, rendering the railroad company liable to the shipper for resulting injuries to the animals.” 6 Cyc. 439, and authorities there cited.

Under this rule it was only necessary for the complaint to show a violation of the duty imposed by law and the resulting injury to the plaintiff. These facts were shown, and the complaint therefore states a cause of action.

Appellant argues at length in its brief that the court erred in refusing to strike out certain parts of respondent's reply to appellant's answer because such parts were sham, frivolous, and immaterial. Such errors, if made by the lower court, are harmless here, for the reason that the cause was tried to the court without a jury, and the whole cause is therefore reviewable here *de novo*. In such cases this court disregards matters of evidence or pleadings which are immaterial. The argument of appellant upon the motion to

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strike parts of the reply is based upon the ground that the contract of shipment heretofore set out in full is a valid and binding contract.

Respondent claims that the contract is void because it is unfair, unreasonable, and not consistent with public policy. Conceding for the purpose of this case, without deciding, that the contract in question is a valid and binding contract, we still think the plaintiff is entitled to recover. There is no provision in the contract exempting the appellant from loss by reason of a violation of the duty to unload said cattle for rest, food, and water, as required by law. If there were such provision, it would certainly be void. There is a provision to the effect that the respondent should load and unload said stock at his own expense and risk at any place where the same may be unloaded for any purpose whatever. But this provision cannot be held to relieve the appellant for a breach of duty to unload for rest, food, and water, as required by law, and it is not claimed that an opportunity was given to the respondent to unload for these purposes which he neglected or refused to avail himself of.

It was also the duty of the carrier to deliver the cattle to the consignee in or through inclosed lots or yards convenient to the place of unloading. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73. While the contract provided that the respondent should unload the cattle at his own risk, it did not provide for such unloading at a place where there were no facilities therefor. The evidence shows that respondent did not know that there were no yards or pens or other facilities at the place of destination for unloading the said cattle, and he was not informed thereof. His contract therefore must be construed as made with reference to unloading where there were the usual and proper facilities for such work. There were no facilities for unloading at the place of destination, and none were furnished. By reason thereof respondent's

cattle were scattered, and he was put to extra expense to gather them again. We think there is no provision in the contract which reasonably construed would waive loss on this account.

Appellant also contends that respondent waived any claim for damages by failure to present a claim therefor within ten days from the date of unloading said stock, as provided in the contract. The evidence shows that no written claim was presented until June 2, 1903. The stock was unloaded on May 19, 1903. The contract does not require the claim to be made in writing, or in any specified form. The evidence shows that on the next day after the stock was unloaded, respondent talked with the agent at Marian and told him that he wanted to put in a claim for loss, without mentioning any definite amount; that the agent told respondent to see the agent at Kalispell when he paid the freight; that respondent went to the agent at Kalispell to pay the freight, and talked with him about the claim for damages, and the agent there directed respondent to see Mr. Jackson at Spokane; that, two or three days prior to June 2, 1903, respondent saw Mr. Jackson, who requested him to write a letter, and that he, Jackson, would thereupon attend to the matter right away. Thereupon, on June 2, 1903, respondent wrote the following letter:

"Arlington, Ore., June 2nd, 1903.

"Mr. H. A. Jackson. Dear sir: I shipped a train of cattle from Heppner, Oregon, to Marian, Mont., on the 18th day of May; I left Heppner at 8 o'clock and 30 minutes in the morning, reached Spokane ten minutes to twelve in the night, and I was till after nine the next night getting to Marian, and had a loss of 18 head of cattle, 14 cows, 2 calves and two yearling steers, which were worth \$490, and I make claim for that amount. The train should have reached Marian before noon on the 19th, and I would have been \$1,000 better off if it had, for the cattle scattered on me trying to get them to pasture in the night, and it took several days of time and expense to get what I got, and

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there is still 35 head lost that I have offered \$2 per head for. I think you can see my situation. Should you want any further proof of what I say, your people at Marian and also W. F. Hubbart, of Hubbart Cattle Co., Kalispell. Your services were good, only I was kept sidetracked almost half of the time I was on your line with the train. Whose fault it was I don't know. There is a chance to do a lot of business in that section, and if this claim is settled and I get the service in future that I have reason to believe you can give, there is nothing in the way of doing a good deal of business in the future. Hoping to hear from you in the future, I am, yours very truly, J. E. Reynolds."

This claim for damages was within time under the contract. On the next day after the cattle were unloaded, respondent notified appellant's agent that he desired to make a claim for damages. Appellant's agents cannot be permitted to put respondent off from one time to another, and finally be heard to say that no claim was made in time; especially when respondent was asking to make a claim within the time limited. It is true the claim which was sent to the agent of the company in writing made direct demand for only \$490, the damage then actually known. But it is also stated that there were still thirty-five head lost which respondent had offered \$2 per head for. We are of the opinion that this was sufficient to support the finding of damages for the item of gathering and depreciation in value of lost cattle.

Finding no error in the record, the judgment appealed from is affirmed.

DUNBAR, ROOT, HADLEY, FULLERTON, and RUDKIN, JJ.,
concur.

[No. 5674. Decided September 15, 1905.]

JOSEPH ESCALLIER, *Respondent*, v. ARTHUR B. BAINES,
Appellant.¹

PARTNERSHIP—ACCOUNTING AND DISSOLUTION—FAILURE OF PARTNER TO ACCOUNT—FINDINGS AS TO SOLE MANAGEMENT—EVIDENCE—SUFFICIENCY. In an action to dissolve a partnership in the butchering business for failure of the defendant to account, a finding that defendant had sole management of the business is sustained by evidence that he, only, had experience in the business, ran the meat market, took in and paid out all the money, and the plaintiff was assigned to the stock and butchering grounds where the employees ignored him and followed the directions of the defendant.

SAME—DUTY TO KEEP ACCOUNTS—FINDINGS—IMMATERIALITY. In an action to dissolve a partnership, it is immaterial whether there is support for a finding that the defendant was the only member of the firm capable of keeping books, where it appeared that it was his duty to keep them.

SAME—WILFUL MISCONDUCT OF PARTNER—LOSS OF ASSETS—FAILURE TO ACCOUNT FOR LOSS—GENERAL STATEMENTS—ASSETS—DISTRIBUTION. In an action to dissolve a partnership, such gross and wilful misconduct on the part of the defendant is shown as to warrant a distribution of all the assets to the plaintiff, where it appears that the parties entered into a partnership in the butchering business, the defendant contributing an established business and the plaintiff \$5,000 in cash, which was deposited in bank; that defendant had entire control of the business and handled all the money; that he failed to keep any records or accounts as required by the articles of copartnership, and in two and one-half months the entire assets, including accounts discoverable, amounted to less than \$4,000, although he had previously been doing a profitable business, and that it was impossible to determine the actual amount of his indebtedness to the firm, and he offered no proof of any specific loss by the firm.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 21, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for an accounting and dissolution of a copartnership. **Affirmed.**

¹Reported in 82 Pac. 181.

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James T. Burcham, and *Happy & Hindman*, for appellant.
Munter & Jesseph, for respondent.

HADLEY, J.—This action involves a controversy over the distribution of partnership funds. On the 19th day of March, 1904, the plaintiff and defendants entered into a copartnership in the wholesale and retail butchering and meat business, to be conducted in the city and county of Spokane, and elsewhere in this state, as might be thereafter determined. The copartnership agreement was in writing. It provided that the partnership should begin on the date aforesaid and should continue as long as it should be agreeable to the partners. It was also provided that each of the partners should devote time, capital, and attention to the business, and should keep faithful record and account of the portion of the business of the partnership transacted by him, and render the same to the other partners when required. The amount of time, capital, and attention expected from each partner was not stated, general terms only being employed in that portion of the agreement.

The defendant Baines had theretofore, and for some years, been engaged in the same line of business, and for some time had been conducting such a business in the city of Spokane. As a part of the partnership arrangement, he sold his stock of meats on hand to the partnership, and turned into it as his contribution to its assets the good will of his business already established, and also the use of the furniture and fixtures used in connection therewith. The plaintiff contributed \$5,000, cash, to the assets of the firm, but neither cash nor property was contributed by the other partner, the defendant Brooks. In a short time said Brooks, having contributed nothing except his services, withdrew from the firm, taking therefrom only sufficient cash to pay him for his services.

The defendant Baines had had much experience in the butchering and meat business, but the plaintiff had therefore had no experience therein, which fact was well known to said Baines. By mutual consent Baines was assigned to the care and management of the meat market in the city. The \$5,000 contributed by plaintiff was placed in the bank, and it was agreed that Baines alone should check against the same, or against any of the deposited funds of the firm. He conducted the sales of meat, received the cash therefor when cash was paid, and wholly managed the disposition of all the funds of the firm. The plaintiff was assigned to the stock and butchering grounds, but, being without experience as aforesaid, the experienced butchers who had theretofore been in the employ of Baines were continued in the employ of the firm. Meantime the plaintiff rendered services about the care of the stock. During the time Brooks continued with the firm—three or four weeks—he assisted about the meat market in the city and purchased some cattle, payment for which was, however, made by Baines from firm moneys.

The plaintiff withdrew nothing from the firm. He became dissatisfied with the way the business was going, and about a month after the partnership began, he asked Baines for an accounting and dissolution. A statement of the condition of the business was promised by Baines, but was postponed from time to time until about June 1st, when he furnished plaintiff a writing which showed a total of assets on hand, including unpaid accounts, of \$3,906.76. A finding of the court is to the effect that, of the outstanding accounts which were included in said statement as a part of the assets, \$619.17 remains uncollected, some of which is denied and most of which is uncollectible. The statement as furnished showed less total assets on hand, by the sum of \$1,093.24, than plaintiff himself had paid into the firm two and one-half months before. Assuming that the court's finding as to the uncollectibility of accounts is

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practically correct, the total available assets on hand at the time Baines rendered his statement amounted to \$1,712.41 less than plaintiff's cash contribution made to the firm two and one-half months before.

At this juncture, no agreement as to accounting and dissolution of the partnership being reached, the plaintiff instituted this suit to effect such accounting and dissolution, and a receiver was appointed to take charge of the partnership assets. The receiver, having sold the tangible assets and collected most of the outstanding accounts, deposited with the registry of the court the sum of \$3,146.67, and was discharged. Thereupon, on stipulation of the parties, Adolph Munter was appointed receiver, and he has since collected, and has in his possession, \$135.18. The court after hearing evidence, made findings of facts and conclusions of law, and entered a decree to the effect that the plaintiff is entitled to the whole of said sum now in the registry of the court, and also to what is in the hands of said Munter as receiver. It was further decreed that plaintiff is entitled to receive from the receiver all the uncollected accounts of the partnership, and the title thereto is vested in plaintiff. From said decree the defendant Baines has appealed.

The court made the following finding:

"That defendant Arthur B. Baines from the beginning of said partnership had, until the date of the appointment of said receiver, sole management and control of the said business and of the books thereof, had received all moneys whatsoever belonging to and which were received by said copartnership, and made all the disbursements of moneys for aforesaid copartnership."

It is complained that the above finding was not justified by the evidence, at least, so far as related to the control and management of the business. We think the finding as a whole is substantially supported by the evidence. The evidence certainly shows, at least to our satisfaction, that appellant received and disbursed all the moneys. So far

as the matter of sole management and control of the business is concerned, we think that, for all practical purposes, the finding that appellant managed the business is correct. It is true the respondent rendered some services at the stock grounds, but the evidence does not show that his views as to the policy and method of management there were adopted, but rather the contrary in that his suggestions were ignored by the employees there, who were the former employees of appellant, and who followed the latter's views as to management under the partnership.

The following finding was made:

"That the defendant Baines was the only member of the firm capable of keeping any books or accounts, but that he failed to keep any books or accounts or even vouchers of money received or of disbursements made, except that for the first ten days of said copartnership he noted down the cash sales, and except that he preserved the bank checks and bank deposit books and the stubs of the checks drawn by him for the firm. That he received all of the moneys taken in either at retail for cash sales, or collected from retail or wholesale customers, without keeping any account whatever thereof except to give credit to the customers for their payments."

It is complained that there is no evidence to support that part of the above finding that appellant "was the only member of the firm capable of keeping any books or accounts." Even if it be true that said portion of the finding may not be supported by testimony, still the remainder of the finding is well supported by evidence. Appellant was the member of the firm who, by mutual consent, undertook to handle the cash, to make sales, and disburse the money for purchases and otherwise. Appellant himself admits that, after the first two weeks, he believed the business would not prove to be satisfactory, and that he ceased to keep accounts. The partnership agreement contained the provision that each member of the partnership "shall keep faithful record and account of the portion of the business of the partnership

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transacted by him, and render same to the other partners when required." Appellant failed to comply with the above requirement. He was the only member of the firm who controlled and managed the funds, sales, collections, and disbursements, and his work especially called for the keeping of accounts under the firm agreement, and also in order that such a record might be kept as would advise respondent of the condition of the business. The evidence shows that very little money was handled by respondent, and that he fully accounted for all of it, and paid it over to appellant. The same is true as to the other partner Brooks, whose connection with the firm was really no more than that of a short-time employee. It therefore became appellant's duty to keep accounts, and it is immaterial whether respondent or Brooks could, in fact, do so or not. The evidence shows that, by reason of appellant's failure to keep accounts, it became impossible to satisfactorily arrive at any definite conclusion as to what became of the large amount of missing partnership assets in so short a time. What is said about possible variations in the market is of a purely general and speculative character, and furnishes no basis for definite computation.

The court entered, among others, the following conclusion of law: "That the defendant Arthur B. Baines was guilty of constructive fraud by his failure to keep books and accounts." Appellant contends, that the misconduct shown is not such as justifies the conclusion of the court; that he is entitled to an equal division of the partnership assets now under control of the court; and that the court should not, under the facts shown, award to respondent any greater sum than would be coming to him under an equal division of the assets.

Appellant cites *Beachman's Assignees v. Eckford's Executors*, 2 Sandf. Ch. (N. Y.) 116. In that case, however, there was long delay in the settlement of accounts, and the court for that reason stated that it regarded the delay

the fault of both parties, and that one was therefore as culpable as the other. The extreme reverse was true in the case at bar. A similar state of facts existed in *Garnett v. Wills* (Ky.), 69 S. W. 695, also cited by appellant. The partners were found to have been equally culpable in failing to keep proper accounts, and they had postponed settlement until one had died. Witnesses had also died, and by reason of the delay necessary records were lost or destroyed. It was held that, under such circumstances, a court of equity will not undertake to settle partnership accounts. Appellant cites, *Succession of Gassie*, 42 La. Ann. 239, 7 South. 454. There the only persons interested had made an extra-judicial settlement of the matters involved, and by their joint action had so involved affairs in confusion that a readjustment was impracticable. The court left the parties where it found them. We do not regard the above authorities as in point when applied to this case.

The theory upon which the judgment of the court below rests is that involved in the maxim *Omnia praesumuntur contra spoliatores*. Appellant argues that the maxim should be applied only in cases of wrongdoers who have actually destroyed or suppressed evidence of their wrongdoing. It may be replied that there would seem to be but little distinction, if any, in principle between the wilful suppression of existing evidence and the wilful neglect to create and preserve necessary evidence which one is under the duty to keep. Appellant cites *Knapp v. Edwards*, 57 Wis. 191, 15 N. W. 140. In that case the court merely held that the above maxim would not be applied to a case where the failure to perform a duty is due solely to incapacity. No such facts appear in the case now before us. Upon the contrary, the capacity of appellant amply appears. It is impossible now to ascertain the actual amount of appellant's indebtedness to the partnership at the time the receiver was appointed, unless we rely upon his own general statement that all funds were used for the benefit of the firm.

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It is held that this is not sufficient; that a partner must keep an accurate and full account of funds drawn by him from the firm showing the disposition of the money, and that general testimony that they were used for the benefit of the partnership is not a sufficient accounting. *Webb v. Fordyce*, 55 Iowa 11, 7 N. W. 385. To hold otherwise would put the culpable party, not only on an equal footing with the party against whom a duty is neglected, but in many cases would give him an actual advantage.

The rule applied by the trial court in this case was extensively discussed in *Bingham v. Keylor*, 25 Wash. 156, 64 Pac. 942. We think in essential features that case is controlling here. The court in that case quoted approvingly from 2 Lindley, Partnership (2d Am. ed.), p. 948, as follows:

"If no books of account at all are kept, or if they are so kept as to be unintelligible, or if they are destroyed or wrongfully withheld, and an account is directed by a court, every presumption will be made against those to whose negligence or misconduct the nonproduction of proper accounts is due."

The above stated rule applies directly to the case at bar. Appellant, however, contends that there must be evidence of the amount of the loss caused by the fraud, and that mere spoliation or suppression is not in itself evidence as to that fact. It is argued that this principle was recognized in *Bingham v. Keylor*, *supra*, and that the court stated that there was some evidence in that case in addition to the mere fact of the suppression of the accounts and spoliation. The court quoted from *Askew v. Odenheimer*, Fed. Cas. No. 586, in which case it appears there was nothing shown in addition to the mere fact of spoliation except the respondent's oath in his answer. Even then the court said in the last named case that, if the master had reported any specific amount, it would not have disturbed the report. The argument of the court shows that even slight evidence is

sufficient; that "if it conduces to prove the charge, it is legally sufficient. Its weight or credibility is a matter of discretion and circumstance."

There was some evidence in the case at bar in addition to the mere fact of suppression and spoliation in the way of refusal to keep accounts. It is clear that the firm assets were reduced at the rate of about \$500 per month during the short time the firm business was running. Appellant handled and controlled all the funds. He himself testified that he had theretofore done a profitable business, and it sufficiently appears that the business of this firm was, for the short time it was run, in practical effect managed and conducted under his general direction. He testified that he drew but \$40 from the assets for his individual purposes. There was not satisfactory proof of any actual or special loss. We therefore think there was sufficient evidence, under the rule here invoked, and as discussed in *Bingham v. Keylor*, to establish in behalf of respondent that there was no actual loss; and if respondent is now willing to accept the amount awarded him instead of the \$5,000 contributed by him only two and one-half months before the receiver was appointed, it would seem that appellant should not complain, in view of his gross and wilful neglect to discharge a duty which would have placed before the court the exact condition of the partnership affairs.

We believe the judgment was correct, within established rules, and it is affirmed.

MOUNT, C. J., ROOT, DUNBAR, and RUDKIN, JJ., concur.

FULLERTON, J., took no part.

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[No. 5601. Decided September 15, 1905.]

E. L. OLWELL, *as Trustee in Bankruptcy of W. B. Littell,*
Bankrupt, Appellant, v. B. L. GORDON &
COMPANY, *Respondent.*¹

FRAUDULENT CONVEYANCES—SALE OF STOCK OF GOODS IN BULK—CREDITORS. A sale of a stock of goods in bulk without taking a statement of the names of, and amounts due to, creditors, is void as to creditors, under Laws 1901, p. 222.

BANKRUPTCY—FRAUDULENTLY INSTITUTED BY VENDEE OF BANKRUPT—DEMAND FOR GOODS—DELAY. Where a fraudulent vendee of a debtor, after losing the goods to the creditors, fraudulently instituted an involuntary bankruptcy proceeding against the debtor, in which the creditors do not appear, and the trustee delays for more than a year to make any demand for the value of the goods, nor until it is too late for the creditors to file their claims, the trustee is estopped to prosecute any action for the recovery of the value of the goods.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered October 4, 1904, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action by a trustee in bankruptcy to recover of a creditor the value of a stock of goods. Affirmed.

H. A. P. Myers, for appellant.

Danson & Huneke, for respondent.

MOUNT, C. J.—In November, 1901, W. E. Littell owned a stock of goods in Davenport, this state, upon which stock of goods he was indebted largely in excess of its value. Shortly prior to December 7, 1901, said Littell sold said stock of goods to Myers & Olwell, merchants at Davenport, for \$577.07. No affidavit showing the creditors of said

¹Reported in 82 Pac. 180.

Littell was given or demanded. On December 7, 1901, the respondent, for itself and other creditors whose claims had been assigned to it, began an action against said Littell, and attached said stock of goods in the hands of Myers & Olwell. It was the intention of respondent to represent all the creditors of Littell, but by an oversight two creditors for small amounts were omitted. Thereafter in March, 1902, respondent obtained judgment against said Littell, and on April 9 said stock of goods was sold at sheriff's sale for \$300 to one Brown, who immediately resold the same to said Myers & Olwell, for \$350.

On December 14, 1901, Myers & Olwell began proceedings in involuntary bankruptcy against said Littell, in the United States district court, and on July 2, 1902, Littell was adjudged a bankrupt. Thereafter, on August 16, 1902, appellant was duly appointed a trustee of the bankrupt estate. Respondent and the creditors it represented did not appear in the bankruptcy proceeding, and filed no claims therein. On August 4, 1903, more than one year after the adjudication of bankruptcy, and after the time for filing proof of claims against the estate had expired, appellant brought this action to recover from respondent the value of the goods. Prior to the commencement of this action, the trustee in bankruptcy made no demand upon respondent for the return of the goods or their value.

Upon the trial the lower court found that the value of the goods sold under the judgment in the attachment proceedings was \$300, and that the trustee in bankruptcy and Myers & Olwell and the said bankrupt Littell fraudulently conspired together and brought the bankruptcy proceeding for the purpose of defrauding the respondent, and, in order to carry out said fraudulent design and conspiracy, delayed for more than a year after the adjudication in bankruptcy to make demand of any kind for the said goods or their value, for the sole purpose of preventing the respondent

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and other creditors from participating in any of the assets of said estate. For that reason the lower court dismissed the action. The trustee now prosecutes this appeal.

We think the judgment of the lower court must be sustained. The evidence contained in the record amply justifies the finding that the value of the goods at the time of the sale was but \$300, and that, at the time of the sale by Littell to Myers & Olwell, there were numerous creditors whose claims against Littell for these very goods were largely in excess of the value thereof, and that appellant and Myers & Olwell designedly delayed notifying respondent to return the goods or pay the value thereof to the trustee, for the purpose of preventing respondent from filing claims in the bankruptcy estate. Myers & Olwell purchased the whole stock of goods in bulk without taking or demanding a statement of the names of creditors or the amount of indebtedness due such creditors. Such sale was fraudulent and void, under the act of March 16, 1901, Laws 1901, p. 222. The purchasers, as well as the seller, were parties to the fraud. After the goods had been attached upon the ground of fraud, the appellant and all the parties to the fraud then set about obtaining advantage of their wrong by bringing an action in bankruptcy, and making no demand for the possession of the goods, and making no request upon respondent to pay the amount of the value of the goods to the trustee, until the time had passed for the actual legitimate creditors of the estate to file claims and participate in the assets of the estate. The said Littell had no property except this stock of goods. Yet the appellant took no steps to obtain possession thereof, and made no request for the same for more than a year after the adjudication in bankruptcy, thereby leading the creditors who had received the same to believe that no demand would be made upon them for it. Respondent, at the time it brought the suit against Littell and attached the goods, in-

tended to represent all the creditors, but by an oversight two small claims were omitted. In its answer in this case, and at the trial, respondent offered to share *pro rata* with these two creditors omitted, so that all the legitimate creditors of the estate should share equally.

The object of the sales-in-bulk act, Laws 1901, p. 222, and the object of the United States bankruptcy law of 1898, was to conserve the estate of insolvent debtors to the creditors *pro rata*. It was not intended that these laws should be so applied as to work injustice or iniquity, which would be the result here if this appeal should be sustained. After the attempted sale by Littell to Myers & Olwell, respondent represented all the creditors. Therefore, under the sales-in-bulk law, respondent was entitled to the proceeds of the purchase price from Myers & Olwell to Littell. But under the proceedings which appellant now seeks to maintain, Myers & Olwell are to be classed as creditors by reason of their fraudulent purchase, and in addition thereto substantially the whole estate shall be distributed to them, to the exclusion of the creditors who are in justice entitled thereto. Under these facts, we think the appellant should be estopped to maintain the action.

The judgment is therefore affirmed.

FULLERTON, HADLEY, DUNBAR, and ROOT, JJ., concur.

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Opinion Per Curiam.

[No. 5602. Decided September 18, 1905.]

M. H. WHITEHOUSE, *Appellant*, v. NELSON DRY GOODS
COMPANY *et al.*, *Respondents*.¹

APPEAL—REVIEW—TRIAL DE NOVO—ERRORS BASED SOLELY ON EVIDENCE—RECORD—STATEMENT OF FACTS—EVIDENCE NOT BROUGHT UP—DISMISSAL. An appeal from an order denying leave to sue a receiver must be dismissed where the errors assigned are based solely upon the evidence, which is not brought up by a bill of exceptions or statement of facts.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered October 26, 1904, after a hearing on the merits before the court without a jury, denying leave to sue a receiver. Appeal dismissed.

Willis H. Merriam, for appellant.

Binkley, Taylor & McLaren, for respondents.

PER CURIAM.—This appeal is from an order of the lower court denying the appellant leave to sue a receiver. The question was heard upon a show cause order. The ruling was based entirely upon facts presented upon a return to the order to show cause. The record before us contains no certified statement of the facts upon which the court based its decision. Respondents move to dismiss the appeal for that reason. The motion must be granted, because the errors relied upon in appellant's brief are based solely upon the evidence heard by the lower court. This evidence—or the facts upon which the order was made—is not brought here by statement of facts or bill of exceptions, settled or certified by the trial court. There are some affidavits in the record, but there is no certificate of the trial judge that these affidavits were all the evidence considered at the hearing, or that the facts therein contained are all the material facts presented.

Under the rule in *Chevalier & Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487, the appeal must be dismissed.

¹Reported in 82 Pac. 161.

[No. 5271. Decided September 18, 1905.]

FIRST NATIONAL BANK OF FOND DU LAC, *Appellant*, v.
FRANK HUNT *et al.*, *Respondents*.¹

ACTIONS—DISMISSAL—FAILURE TO PROSECUTE—DELAY OF THREE YEARS—PLACING CLAIM WITH COLLECTION AGENCY. It is not an abuse of discretion to dismiss an action for want of prosecution where there was a delay for three and one-half years, after the filing of a demurrer, to further prosecute the action, and the plaintiff had placed the claim with a collection agency independently of the action.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered February 16, 1904, after a hearing upon affidavits, dismissing an action for want of prosecution upon the motion of the defendants. Affirmed.

McDonald & Rupp, for appellant.

Sharpstein & Sharpstein, for respondents.

PER CURIAM.—This appeal is from an order of the lower court dismissing the action for want of prosecution. The action was begun against respondents on June 19, 1900, to recover upon two judgments, the liens of which were about to expire. On July 9, 1900, the respondents filed a demurrer to the complaint, upon the grounds that the complaint failed to state a cause of action, and that the action was barred by the statute of limitations. No further proceedings were taken by either party until February 5, 1904, when respondents filed a motion to dismiss the case for want of prosecution. In response to this motion, appellant filed affidavits seeking to justify the delay by reason of the fact that respondents had no property out of which a judgment might be satisfied. It was apparently conceded that the claim had been placed in the hands of a collection agency for collection independent of this action. On the hearing of the motion, the lower court dismissed the action for want

¹Reported in 82 Pac. 285.

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Statement of Case.

of prosecution. It will thus be seen that, after the action had been brought and an issue of law raised upon the pleadings, it was allowed to remain dormant for nearly three and one-half years. This fact of itself is *prima facie* sufficient to show an abandonment of the action. In addition to this fact, the appellant subsequently placed the claim in the hands of an Eastern collection agency for collection independent of the action. Under these facts, we are clear that the lower court did not abuse its discretion in dismissing the cause. *Langford v. Murphy*, 30 Wash. 499, 70 Pac. 1112.

The judgment appealed from is affirmed.

[No. 5656. Decided September 18, 1905.]

JAMES DALGARDNO, SENIOR, *Appellant*, v. H. G. BARTHROP
*et al., Respondents.*¹

JUDGMENTS — EXECUTIONS — SALE AFTER EXPIRATION OF LIEN — VALIDITY. A foreclosure sale under an execution and order of sale, issued more than five years after the entry of judgment, is void.

SAME — FORECLOSURE DECREE — SUSPENSION BY APPEAL — SEPARATE PARCELS—SUSPENSION AS TO ONE TRACT ONLY—STATUTE OF LIMITATIONS. Upon a foreclosure of a mortgage upon separate parcels of land, belonging to different persons, a suspension of the decree as to one tract, by vacation thereof and an appeal to the supreme court, does not suspend it as to the other tract, so that an execution and sale as to such part is barred after the expiration of five years from the date of the judgment.

TAXES—PAYMENT OF ONE IN POSSESSION UNDER VOID FORECLOSURE SALE—EQUITABLE LIEN FOR. The purchaser at a void foreclosure sale, who takes possession in good faith, and pays the taxes, is entitled to a lien upon the premises for the amount of the taxes paid.

Appeal from a judgment of the superior court for Jefferson county, Hatch, J., entered December 10, 1904, dismissing an action to recover possession of real estate, upon sustaining a demurrer to the amended complaint. Modified.

¹Reported in 82 Pac. 285.

U. D. Gnagey, for appellant.

Trumbull & Trumbull, for respondents.

Root, J.—On March 31, 1896, appellant obtained, by default, a judgment and decree of foreclosure of mortgage upon two distinct and separate parcels of real estate in Jefferson county. The default and decree as to one parcel was subsequently set aside, further proceedings had regarding the same and eventually a decree entered against appellant's attempt to foreclose upon said parcel. The action of the trial court in vacating said decree, as to said parcel, and its final judgment and decree that plaintiff take nothing as against said lot, was affirmed upon appeal, by this court on June 28, 1901. *Dalgardno v. Trumbull*, 25 Wash. 362, 65 Pac. 528.

On July 19, 1901, appellant caused an order of sale to be issued upon the judgment and decree of March 31, 1896, and caused the other parcel of said real estate to be sold, the decree as to said portion never having been vacated or appealed from. At the sale thereof, appellant bought it, and has since paid taxes thereon under the belief that he had good title thereto. Appellant commenced this action to recover possession of said property and to have the taxes he had paid declared to be a lien thereupon. From an adverse judgment, he appeals.

It is urged that this sale was null and void for the reason that the order of sale was issued more than five years after the entry of the judgment and decree, and without any reviver. Such has been the holding of this court and the contention must be sustained. *Brier v. Traders' Nat. Bank*, 24 Wash. 695, 64 Pac. 831; *Packwood v. Briggs*, 25 Wash. 530, 65 Pac. 846.

Respondents contend that the appeal taken as to part of the judgment and decree had the effect of suspending the operation of the statute of limitations as to all of the judgment and decree until the final judgment in the supreme

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court was entered. This position is not tenable for the following reasons. The two parcels were owned by different persons. The owner of one of these parcels made no effort to set aside, or modify, or appeal from the judgment and decree as to his property. Appellant could have had execution against said property immediately upon entry of said judgment and decree, or at any time thereafter up to the end of five years, and could then have revived the judgment. But he did not do so. He was doubtless waiting for the outcome of the litigation as to the other portion. When that was settled, however, he attempted no revivor as to the other parcel, but proceeded to sell it notwithstanding the expiration of the five year limit. The owner of this parcel of land had it burdened for five years by this judgment. The fact that appellant was litigating with some one else about some other property seems to us to afford no reason why the owner of this should not have the benefit of the statute of limitations as to his property. The five year period began to run from the date of the entry of the judgment and decree, March 31, 1896, and, as to the tract in question, was never interrupted.

The action of appellant in paying taxes upon the property was such that he is entitled to a lien thereupon for the amount so paid.

The case is remanded to the superior court with instructions to ascertain the amount of taxes paid by appellant upon said real estate, and to decree the same a lien upon and against said property. Costs in both courts to appellant.

FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 5668. Decided September 18, 1905.]

PETER J. NIELSEN, *Appellant*, v. NORTHEASTERN SIBERIAN
COMPANY, LIMITED, *Respondent*.¹

APPEAL—REVIEW—THEORY OF TRIAL—SAME AS IN LOWER COURT—
TORT OR CONTRACT. When counsel state in the court below that the
action is upon contract, it will be tried upon that theory on appeal.

CONTRACTS — PARTLY WRITTEN AND PARTLY ORAL — NEGOTIATIONS
CULMINATING IN WRITTEN AGREEMENT. Oral statements of solicitors
of the defendant are not part of a written contract of employment
signed by the defendant's president and manager, whereby plaintiff
agreed to prospect in Siberia for more than one year; since the writ-
ten contract is presumed to embody the terms of the agreement, and
the solicitors had no power to bind the company by an oral agree-
ment, not to be performed within one year.

SAME — AGENTS — SOLICITORS—AUTHORITY—STATEMENTS PRELIMI-
NARY TO EXECUTION OF WRITTEN CONTRACT BY OFFICER OF COMPANY.
An agent employed merely to solicit prospectors to engage in the
service of the principal, has no authority to make or modify a con-
tract of service for the principal.

CONTRACTS—TO PROSPECT IN SIBERIA—TRANSPORTATION—DESTINA-
TION OR PORT OF DELIVERY—EXPULSION FROM SHIP—BREACH OF CON-
TRACT—FINDINGS—EVIDENCE—SUFFICIENCY. Where the plaintiff en-
gaged to prospect for the defendant in Siberia, and was transported
to the Siberian coast in one of the defendant's vessels, without speci-
fication as to the port where he should be landed, except that it
was to be on the Siberian coast, it is not a breach of the contract
that he was forcibly ejected at a point where the defendant had a
station.

Appeal from a judgment of the superior court for King
county, Griffin, J., entered July 23, 1904, upon findings in
favor of the defendant, after a trial on the merits before
the court without a jury, in an action for breach of contract.
Affirmed.

G. M. Emory, for appellant.

John P. Hartman, for respondent.

¹Reported in 82 Pac. 292.

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Opinion Per Root, J.

Root, J.—On July 6, 1903, appellant and respondent entered into a written agreement by which the former was to be taken by the latter to Siberia, to prospect for precious metals within the limits of a mining concession theretofore granted by the Russian government to respondent. Appellant was to be furnished with transportation, tools, and food, and to have the privilege of prospecting within said territory, and to receive one-half of all values obtained by him. He embarked July 13, 1903, from Nome for the Siberian coast, upon the respondent's steamship "Manauense." Defendant John Rosene was president and manager of the respondent corporation and, as such officer, signed the company's name to the written contract with appellant. Defendant S. S. Connauton was the master in command of the ship upon the voyage. Defendant McCowan was an agent of respondent aboard the Manauense.

The ship reached East Cape, Siberia, July 21, 1903, where respondent requested appellant to land. He refused to do so, requesting that he be put ashore at Rudder's Bay, a point further down the coast, where respondent had no station and where its sea-going vessels did not stop. This being refused, he requested to be carried to Vladimir, a port where the ship would touch on its return to Nome. Respondent's officers told him that he must go ashore or pay his fare back to Nome. He refused to do either. He was then told by the officers that he would be put ashore unless he paid his fare for the return trip or left the vessel voluntarily. He still refused, whereupon the captain and McCowan went to appellant's berth where he was partially undressed, and ordered a number of the Chinese crew to carry him to a launch at the ship's side. Appellant resisted forcibly, but was handcuffed, placed aboard the launch, and carried to the shore. His clothing and personal effects were given him in the launch. He claims that in the melee sixty dollars were stolen from the pockets of his pantaloon by the Chinamen. It is his contention that, in addition to the

written contract, there was an oral one—or, rather, that the contract was partly written and partly oral. The basis for this contention is the fact that appellant, before his employment, went to one Perkins, an agent of respondent at Nome, and sought employment as a prospector. Perkins told him to talk with one Armstrong, who seems to have been in the service of respondent and on the lookout for prospectors. Appellant claims that Armstrong told him he could land where he pleased, and be returned to an American port whenever he desired. The written contract required appellant to remain until October, 1904.

Appellant brought this action to recover damages, which he alleged in the sum of \$10,150. At the close of plaintiff's case, the action was dismissed as to defendant John Rosene. At this juncture, a motion was made to transfer the case to the Federal court. Whereupon appellant reduced his claim of damages to \$1,950, and the trial proceeded before the superior court without a jury. Findings and conclusions were made and entered by the trial judge favorable to respondent. From a judgment of dismissal, this appeal is taken.

Some question is raised as to whether this is an action in tort or one for breach of contract. From the record it appears that appellant's counsel, in open court, made the following statement:

"I will state to the court this action is based purely and simply on a contract and on the breach of the contract. There were certain tortious features about the breach, but the action is none the less based upon the contract."

Appellant having tried the case upon that theory in the superior court, it must be considered here upon the same theory. *Sanders v. Stimson Mill Co.*, 34 Wash. 357, 75 Pac. 974.

The contention that the contract was partly oral we do not think can be sustained. The negotiations with Perkins and Armstrong may have been matters of inducement; but

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the only contract was the written one which appellant signed and which respondent signed by its president and manager, Rosene. The conversations, promises, and understandings leading up to a written contract do not constitute a part of the agreement. They culminate in the written instrument which is presumed to embody those matters upon which there has been a meeting of minds. As this was an undertaking not to be completed within a year, it is doubtful whether an oral agreement covering the same would have any validity. Carter's Alaska Code, § 1094; *Miller v. Goodrich Bros. Bank Co.*, 53 Mo. App. 430; *Boyd v. Paul*, 125 Mo. 9, 28 S. W. 171; *Lang v. Henry*, 54 N. H. 57.

There having been a valid written contract, it would seem to be immaterial as to what authority Perkins and Armstrong had touching the matter of employing prospectors—it not being claimed that they, or either of them, made any representations or arrangements other than orally. The written contract being signed on behalf of the company by Rosene, this fact was evidence to appellant as to whom he should deal with concerning matters appertaining to his contract of employment. It would seem from the evidence that Armstrong, upon whose statements appellant seems principally to rely as a part of his contract, was merely a man employed to solicit prospectors to engage in respondent's service. As such he would not have power to make or modify contracts for respondent. *Rich v. Chicago etc. R. Co.*, 34 Wash. 14, 74 Pac. 1008.

It is urged by respondent that appellant is estopped to allege breach of contract, for the reason that, after being landed, he worked for several months according to the terms of the contract, being supplied with tools and subsistence by respondent, and finally returned to Nome upon respondent's ship free of charge. Ordinarily one may not claim the fruits of a contract without assuming its burdens. It is unnecessary, however, to invoke the rule here.

We are unable to see wherein the respondent has been guilty

of a breach of the contract. Appellant by the written agreement engaged to work as a prospector for respondent until October, 1904. When the vessel conveying him reached the place for landing, he refused to go ashore. By this refusal he was guilty of a breach of the contract. Appellant received a certificate from respondent reciting that he should "have the right to locate and stake mining claims upon any unlocated mineral lands within the limits of the company's concession." He argues that this gave him permission to be landed and to prospect wherever he wished within said limits. This contention cannot be upheld. Neither the contract nor the certificate provided as to where he should be placed ashore, except that it was to be upon the 'Siberian coast. Respondent gave appellant letters to its agents at East Cape, St. Nicholas, and Vladimir. It does not appear that respondent had stations at any other place than these, or that this ship ever called at any other ports. Some smaller craft were used for traveling from place to place along the coast. It does not appear but that appellant could have gone to any point he wished upon these coasting vessels. We think there was no breach of the contract on the part of respondent in ejecting appellant from the ship at East Cape.

We are not called upon to consider the tortious features alleged, other than as they have to do with the alleged breach of contract. We deem the findings and conclusions of the trial court justified, and its judgment is therefore affirmed.

MOUNT, C. J., DUNBAR, FULLERTON, HADLEY, and CROW, JJ., concur.

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[No. 5544. Decided September 19, 1905.]

ERNEST DEXTER *et al.*, Respondents, v. A. B. OLSEN,
Appellant.¹

LIENS—FOR LABOR UPON FARM PRODUCTS—NOTICE—DESCRIPTION OF PROPERTY—SUFFICIENCY. A notice of a laborer's lien upon farm products is insufficient to give the court jurisdiction of an action to foreclose the lien where the products are described as 850 sacks of wheat raised on certain described premises, without locating or describing the sacks.

SAME—AMENDMENT OF NOTICE—STATUTES—CONSTRUCTION. A notice of a laborer's lien upon farm products cannot be amended, being controlled by Bal. Code, §§ 5957-5959; and §§ 5944, 5945 and 5904 not being applicable.

STATUTES—AMENDMENT. Where a general law is by reference made applicable to a later act, the subsequent amendment of the general law will not be applicable to the later act.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered September 9, 1904, after a trial on the merits before the court without a jury, foreclosing a lien for labor performed in harvesting a crop of wheat. Reversed.

J. G. Thomas, for appellant.

George T. Thompson and *Oscar Cain*, for respondents.

Root, J.—Respondents commenced this action to foreclose an alleged lien for services rendered in gathering a wheat crop upon which appellant held a chattel mortgage. From a judgment and decree foreclosing said lien, an appeal is taken to this court.

It is contended by appellant that the lien notice is fatally defective on account of the lack of description of the property sought to be held. The only description of said property therein is contained in the following extract.

“Notice is hereby given that J. Z. Smith and Ernest Dexter of Walla Walla county, state of Washington, claims a lien

¹Reported in 82 Pac. 286.

upon that certain crop of wheat, being about 450 acres in quantity, being about 850 number of sacks of wheat, which was raised by the said Austin upon the following described premises, situated in Walla Walla county, state of Washington, to wit, NE $\frac{1}{4}$ and SE $\frac{1}{4}$ Sec. 2, Tp. 11, NR 34, and SE $\frac{1}{4}$, Sec. 26, Tp. 12, NR 34, and the NW $\frac{1}{4}$ Sec. 2, Tp. 11, NR 34 E. W. M. The aforesaid lands having been cultivated for the crop of 1903, by said V. F. Austin."

The statute requires the lien notice to "contain a description of the property to be charged with the lien sufficient for identification with reasonable certainty." Bal. Code, § 5936. The lien notice involved in this case tells the approximate number of sacks of wheat (about 850), and states where it was grown. But there is no other description. Nothing is said as to the quality or kind of wheat, nothing as to the character, size, or markings of the sacks. The whereabouts of the wheat is in no manner indicated. It may have been in the field, in the barn, or in somebody's warehouse. It may have been in Walla Walla county, or elsewhere. It may have been in the state of Washington, or in some other state. We do not see how any person could locate or identify the wheat in question by the description given. Unless he should resort to sources of information outside of the lien notice, an officer seeking to execute a judgment or decree against this wheat would be powerless. The facts set forth in the notice are not sufficient, in themselves, to show jurisdiction of the court over the subject-matter.

It is contended by respondents that, if the lien is defective, it may be amended. No application to amend was made to the superior court. None is made here, but merely a suggestion that an amendment might be permitted under the authority of *Olson v. Snake River Valley R. Co.*, 22 Wash. 139, 60 Pac. 156. This is not a request to make an amendment; but, if it were, the case cited would not be authority for granting the request. That case had to do

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with a mechanics' lien. Authority for the court to amend such a lien is expressly given by Bal. Code, § 5904. But this section does not apply to a lien upon farm products. The latter is controlled by §§ 5957 to 5959, inclusive, and by the provisions of the law as to loggers' liens, so far as applicable, and as said provisions stood at the time of the enactment of said §§ 5957 to 5959. Sections 5944 and 5945 were not parts of the statute relative to loggers' liens at the time said statute was, by reference, made a portion of the law controlling liens upon farm products. Hence they cannot be considered as portions of the latter statute now. *Chelan County v. Navarre*, 38 Wash. 684, 80 Pac. 845; *Newman v. North Yakima*, 7 Wash. 220, 34 Pac. 921; *People v. Clunie*, 70 Cal. 504, 11 Pac. 775.

Under numerous decisions of this court, we are constrained to hold this notice of lien void, because the description of the property is inadequate. *Dexter Horton & Co. v. Wiley*, 2 Wash. 171, 25 Pac. 1071; *Warren v. Quade*, 3 Wash. 750, 29 Pac. 827; *Doyle v. McLeod*, 4 Wash. 732, 31 Pac. 96; *Young v. Howell*, 5 Wash. 239, 31 Pac. 629.

The judgment and decree of the honorable superior court is reversed, and the cause remanded with instructions to dismiss the action.

MOUNT, C. J., CROW, HADLEY, FULLERTON, RUDKIN, and DUNBAR, JJ., concur.

[No. 5678. Decided September 19, 1905.]

In the Matter of the Estate of JOHN SULLIVAN, Deceased.
EDWARD CORCORAN *et al.*, Appellants, v. MARIE CARRAU
et al., Respondents.¹

JUDGMENTS—COLLATERAL ATTACK—ORDER OF DISMISSAL VACATING A PREVIOUS ORDER. An order of dismissal, which set aside and took the place of an order of dismissal entered the day before, is presumed regular, on collateral attack by respondent upon moving to dismiss an appeal therefrom because no appeal was taken from the first order, which latter is therefore *functus officio* and without vitality.

APPEAL—FINAL ORDERS. An order vacating a previous dismissal, and dismissing a will contest, is a final order affecting a substantial right, and is appealable, the first order being without further vitality.

WILLS—CONTEST—PLEADING—AMENDMENT OF PETITION—INSTITUTION WITHIN ONE YEAR. When a will contest is filed within time, and the petition is struck out for want of verification, with express leave to amend, the court is not without jurisdiction, and the proceeding is not barred, by reason of the fact that the amended petition was not filed within one year.

SAME—TIME FOR FILING CONTEST. When a decree admitting a will to probate is void, the time for filing a contest is not limited to one year.

SAME—DISMISSAL FOR WANT OF PROSECUTION—PROCEEDINGS STAYED BY INJUNCTION OF FEDERAL COURT—EXCUSE FOR DELAY. It is error to dismiss a will contest for want of prosecution, when the proceedings were restrained by the order of the Federal court, although the proceeding in such court was instituted by the contestants of the will while the matter was still pending in the state courts.

WILLS—PROBATE—CITATION—SERVICE—TEN DAYS NOTICE—ORDER OF PROBATE—JURISDICTION. The probate of a will is void for want of jurisdiction when no notice to the widow or next of kin was given under Bal. Code, § 4606, requiring a ten days' notice of the time set for hearing.

SAME—BURDEN OF PROOF. Upon a contest, the burden of proof is upon the proponent of a will, although a decree had been entered admitting the will to probate, where such decree was void for want of jurisdiction.

¹Reported in 82 Pac. 297.

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Citations of Counsel.

SAME—OFFER OF PROOF OF NUNCUPATIVE WILL—TIME FOR—VOID ORDER OF PROBATE—REVERSAL—EFFECT ON PENDENCY OF PROCEEDING. When proof of a nuncupative will was offered within six months, and a void order of probate was entered thereon, it cannot be claimed, after a reversal of the order on appeal, that the proof was not "offered" in time, and that it is now too late to offer such proof upon the retrial of the contest.

APPEAL — HEARING — QUESTIONS NOT HEARD IN LOWER COURT — ADVISORY DECISIONS. The supreme court will not decide matters never presented for hearing in the court below, where its decision would only be advisory.

Appeal from an order of the superior court for King county, Bell, J., entered January 7, 1905, dismissing a petition to set aside the probate of a nuncupative will, upon granting the proponent's motions to strike and to dismiss for want of prosecution. Reversed.

Piles, Donworth, Howe & Farrell (Shank & Smith, of counsel), for appellants, contended among other things: The statute having expressly provided that no proof should be heard until citation to the widow or next of kin, and proof having been entered without notice, there was no process of law and the decree was a nullity. Pierce's Code, §§ 2331, 2352; Bal. Code, §§ 4606, 6083; *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640; *Corcoran v. Bell*, 36 Wash. 217, 78 Pac. 945; *National Exchange Bank v. Wiley*, 195 U. S. 257, 25 Sup. Ct. 70; *Smith v. White*, 32 Wash. 414, 73 Pac. 480; *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099; *In re Leonard's Will*, 65 N. J. L. 167, 47 Atl. 222; *Randolph v. Bayue*, 44 Cal. 366; *Charlebois v. Bourdon, Adm'r*, 6 Mont. 373, 12 Pac. 775; *Ashurst v. Fountain*, 67 Cal. 18, 6 Pac. 849; *Spencer v. Houghton*, 68 Cal. 82, 8 Pac. 679; *Haws v. Clark*, 37 Iowa 355; *Boals v. Shules*, 29 Iowa 507; *Jones etc. Lumber Co. v. Boggs*, 63 Iowa 589, 19 N. W. 678; *Sprote v. Marshall*, 4 Iowa 344; *Hodges v. Brett*, 4 Iowa 345; *Melbourn v. Fouts*, 4 Iowa 346; *Fernekes v. Case*, 75 Iowa 152, 39 N. W. 238; *Joiner v. Delta Bank*, 71 Miss. 382, 14 South. 464; *Hunsaker v. Coffin*, 2 Ore. 107; *Northcut v. Lemery*, 8 Ore. 316; *Lewis*

v. Bishop, 19 Wash. 312, 53 Pac. 165; *Everett Water Co. v. Fleming*, 26 Wash. 364, 67 Pac. 82; *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165; *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520; *Hovey v. Elliot*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215; *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398; *Winsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914; *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; *Fayerweather v. Ritch*, 195 U. S. 276, 25 Sup. Ct. 58; *Medlock v. Merrit*, 102 Ga. 212, 29 S. E. 185; *Heminway v. Reynolds*, 98 Wis. 501, 74 N. W. 350. The Federal injunction remained in full force and effect during the appeal therefrom, and prevented further action in the state courts. *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888; *Leonard v. Ozark Land Co.*, 115 U. S. 465, 6 Sup. Ct. 127, 29 L. Ed. 445; *Knox County v. Harshman*, 132 U. S. 14, 10 Sup. Ct. 8, 33 L. Ed. 249; *New River Mineral Co. v. Seeley*, 117 Fed. 981; *State ex rel. Commercial etc. Co. v. Stallcup*, 15 Wash. 263, 46 Pac. 251; *State ex rel. Busch v. Dillon*, 96 Mo. 56, 8 S. W. 781; *Ex parte Whitmore*, 9 Utah 441, 35 Pac. 524; *State ex rel. Bettman v. Harness*, 42 W. Va. 44, 26 S. E. 270; *National Docks etc. R. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 167, 33 Atl. 936; *Bullion etc. Min. Co. v. Eurkea Hill Min. Co.*, 5 Utah 151, 13 Pac. 174; *Merced Min. Co. v. Fremont*, 7 Cal. 130; *Heinlen v. Cross*, 63 Cal. 44; *Woodruff v. Taylor*, 20 Vt. 65; *Galpin v. Page*, 85 U. S. 350, 21 L. Ed. 959; *Floto v. Floto*, 213 Ill. 438, 72 N. E. 1092; *Mousseau's Will*, 30 Minn. 202, 14 N. W. 887; *Gay v. Minot*, 3 Cush. 352; *Bailey v. Osborn, Adm'r*, 33 Miss. 128. The statute does not require that a petition contesting a will shall be verified. *Hunt v. Phillips*, 34 Wash. 362, 75 Pac. 970; *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489; 22 Ency. Plead. & Prac., pp. 1016, 1023; *Matthews v. Sontheimer*, 39 Miss. 174; *Hilton v. St. Louis*, 99 Mo. 199, 12 S. W. 657; *Wardle v. Cummings*, 86 Mich. 395, 49 N. W. 212, 538. Even where a statute requires a

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Citations of Counsel.

petition to be verified, the lack of a verification to the petition is not jurisdictional, and much less is a mere defect jurisdictional. *Smith v. Newell*, 32 Wash. 369, 73 Pac. 369; *McCoy v. Ayers*, 2 Wash. Ter. 307, 5 Pac. 843; *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165, 25 Pac. 1070; *Pearson v. Seattle*, 14 Wash. 438, 44 Pac. 884; *Sutherland v. Hankins*, 56 Ind. 343; *Myers v. McGavock*, 39 Neb. 843, 58 N. W. 522, 42 Am. St. 627; *Hamiel v. Donnelly*, 75 Iowa 93, 39 N. W. 210; *Ellsworth v. Hall*, 48 Mich. 407, 12 N. W. 512; *Trumble v. Willaims*, 18 Neb. 144, 24 N. W. 716. The contest was instituted by the first appearance, irrespective of the amended petition. *Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618, 23 Am. St. 887; *Sinnet v. Bowman*, 151 Ill. 146, 37 N. E. 885; *United States Ins. Co. v. Ludwig*, 108 Ill. 514; *George v. Reed*, 101 Mass. 378; *Wolf v. Bauereis*, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680; *Buel v. St. Louis Transfer Co.*, 45 Mo. 562; *South etc. R. Co. v. Bees*, 82 Ala. 340, 2 South. 752; *Blanchard v. Lake Shore etc. R. Co.*, 126 Ill. 416, 18 N. E. 799, 9 Am. St. 630; *Texas etc. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Haynie v. Chicago etc. R. Co.*, 9 Ill. App. 105. Nuncupative wills are regarded with suspicion, and the statutes in reference to their execution and probate are strictly enforced. *Prince v. Hazelton*, 20 Johns. 502; *Yarnall's Will*, 4 Rawle 46, 26 Am. Dec. 115; *Carroll v. Bonham*, 42 N. J. Eq. 625, 9 Atl. 371; *Boyer v. Frick*, 4 Watts & S. 357; *Haus v. Palmer*, 21 Pa. St. 296; *Scaife v. Emmons*, 84 Ga. 619, 10 S. E. 1097, 20 Am. St. 383; 1 Redfern, Wills, 185; Schouler, Wills (3d ed.), § 377; *Mitchell v. Vickers*, 20 Tex. 377; *Bronson v. Burnett*, 1 Chand. 136; 4 Kent's Commentaries (13th ed.), 517; *Cole v. Mordaunt*, 4 Veazy 196, note. The superior court is a court of general jurisdiction, and it having had presented to it a petition praying it to set aside a judgment which was void upon the face of the record, and the respondent having appeared in answer to process issued by the court upon that petition, the superior court

acquired full jurisdiction of the controversy presented by the petition. *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446; *In re Yamashita*, 30 Wash. 234, 70 Pac. 482; *Bailey v. Hood*, 38 Wash. 700, 80 Pac. 559; *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 197; *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264; *Rathjens v. Merrill*, 38 Wash. 442, 80 Pac. 754; *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502; *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099. The contention that there was any failure to prosecute on the part of the petitioners is without merit. *Bignold v. Carr*, 24 Wash. 413, 64 Pac. 519; *Herman v. Pacific Jute Mfg. Co.*, 131 Cal. 210, 63 Pac. 344; *Hornick v. Holtrup*, 25 Ky. Law 1030, 76 S. W. 874; *Meloy v. Keenan*, 17 App. D. C. 235; *Ferris v. Wood*, 144 Cal. 426, 77 Pac. 1037; *Beirne v. Wadsworth*, 36 Fed. 614; *Hine v. Grant*, 119 Wis. 332, 96 N. W. 796.

J. P. Houser and *J. W. Robinson*, for respondent Marie Carrau, contended among other things, that the state court had exclusive jurisdiction of the proceedings to probate the will, which therefore would not be affected by the Federal court proceedings. *Carrau v. O'Callaghan*, 125 Fed. 657. It was discretionary to dismiss the contest proceedings for want of prosecution. *Sanborn v. Centralia Furn. Mfg. Co.*, 5 Wash. 150, 31 Pac. 466; *Johnston v. Gerry*, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503; *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907; *Griggs v. MacLean*, 33 Wash. 244, 74 Pac. 360. It was jurisdictional that the amended petition in contest of the probate be filed within one year, after which time the court had no jurisdiction of the subject-matter. Page, Wills, § 323; *Meyer v. Henderson*, 88 Md. 585, 41 Atl. 1073, 42 Atl. 241; *Bacigalupo v. Superior Court*, 108 Cal. 92, 40 Pac. 1055; *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 54 N. E. 185, 72 Am. St. 211; *Evansville Ice etc. Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592; *Bartlett v. Manor*, 146 Ind. 621, 45 N. E. 1060; *Stowe v. Stowe*, 140 Mo. 594, 41 S. W. 951;

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In re Estate of Sbarboro, 63 Cal. 5; *Nichol's Estate*, 174 Pa. St. 405, 34 Atl. 566; *Fritz v. Barnes*, 6 Neb. 435. Want of notice of the probate is nothing but an irregularity where, as here, the statute gives one year within which to file a contest, irrespective of the notice. *O'Callaghan v. O'Brien* (U. S.), 25 Sup. Ct. 727; *Reese v. Nolan*, 99 Ala. 203, 13 South. 677; 16 Ency. Plead. & Prac., 1004; *Hall's Heirs v. Hall*, 47 Ala. 290; *Wetmore v. Parker*, 52 N. Y. 450; *Dickey v. Vann*, 81 Ala. 425, 8 South. 195; *Herring v. Ricketts*, 101 Ala. 340, 13 South. 502; *Wahl v. Franz*, 100 Fed. 680.

HADLEY, J.—This is an appeal from an order dismissing a petition interposed for the purpose of contesting the probate of an alleged nuncupative will. John Sullivan died in the year 1900, leaving a large estate consisting of real and personal property. In November, 1900, Terence O'Brien was appointed general administrator of said estate, and he is still acting as such. On the 8th day of March, 1901, Marie Carrau filed in the superior court of King county, where the administration proceedings are pending, a petition for the probate of an alleged nuncupative will, which she avers was made by the said deceased, and under which she claims to be the sole beneficiary. The record shows that, on the same day the petition was filed, a so-called citation was issued, directed to the widow and next of kin of said deceased, citing them to appear before said court at the hour of 10 o'clock, a. m., on the said day, and reciting that at said time the said petition would be heard. The citation was filed on the same day, and attached thereto was the return of the sheriff that, after diligent search, he was unable to find the widow or next of kin of said deceased in King county. Thereupon, on the same day, the court heard testimony and entered an order admitting said alleged will to probate.

On June 20, 1901, Hannah O'Callaghan and Edward Corcoran filed their petition contesting the said nuncupative

will and the said order of probate. They alleged, that Sullivan died intestate, leaving no widow or children, father or mother, brothers or sisters, and no heir or next of kin other than the petitioners, who are alleged to be the first cousins, and the only first cousins, of the deceased; that said Marie Carrau and two of her sisters and a brother-in-law had conspired together to manufacture a pretended will; and that these persons had procured said order of probate without notice to any one, and without any lawful citation having been issued. They asked that said order of admission to probate be set aside. Marie Carrau answered said petition in November, 1901.

On the 3d day of March, 1902, said O'Callaghan and Corcoran filed a second petition in said contest, and on April 16 of said year Marie Carrau moved to strike said last named petition, on the ground that it was neither signed nor verified by the petitioners, nor by any one authorized in law to verify it. The court granted this motion, and expressly granted the petitioners leave to amend. The petitioners then filed an amended petition containing a verification by counsel which stated that the petitioners were non-residents, and that they were not in King county. The last named petition was filed April 19, 1902. Marie Carrau moved to strike this petition on the alleged ground that the petitioners had not appeared to contest said will within one year from the probate thereof, and afterwards, in March, 1904, before said motion was ruled upon, she further moved that the petition be dismissed for want of prosecution. On the 6th day of January, 1905, the court entered an order granting said motions and dismissing the petition. On the following day, January 7, the court entered the following order:

"It is by the court ordered that, as the order of the undersigned made on January 6th, 1905, dismissing the amended petition of contest of the above amended petitioners filed April 19th, 1902, was made in the absence

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of counsel for petitioners, the said order is set aside and now on this 7th day of January, 1905, the said amended petition is hereby dismissed. W. R. B. This order is made for the purpose of having the order of Jan. 6th, 1905, entered and effective as of this date."

At the time of the entry of the last named order, Edward Corcoran and Charles H. Farrell, as administrator of the estate of Hannah O'Callaghan, deceased, gave oral notice in open court that they appealed from so much of said order as dismissed the said petition. It is that appeal which is now before us.

Terence O'Brien, as the administrator of the Sullivan estate, is made a party respondent to this appeal, but Marie Carrau is the only respondent who has appeared by counsel in this court. Said respondent has moved to dismiss the appeal, on the alleged ground that the record discloses facts which deprive this court of jurisdiction. Respondent's contention in this particular is based upon the following facts: As above stated, the court, on January 6, 1905, entered an order dismissing appellants' petition. . On January 7 that order was vacated, and another order of dismissal was entered, a copy of which is hereinbefore set out. The oral notice of appeal relates to that part of the last order which dismissed the petition. Respondent contends that the real judgment of dismissal was that entered January 6, and that no appeal has been taken from that judgment. Respondent has not appealed from the order of January 7, and her motion to dismiss the appeal is therefore a collateral attack upon so much of that order as vacated the order of January 6. When proceedings are collaterally attacked, all intendments are in favor of their regularity, and inasmuch as the court found that the first order should be vacated and set aside, we must presume that its finding was based upon sufficient cause, unless the contrary clearly appears. *Morrison v. Berlin*, 37 Wash. 600, 79 Pac. 1114. In *Colton*

Land & Water Co. v. Swartz, 99 Cal. 278, 33 Pac. 778, the court said:

"The court had jurisdiction of the parties to the action and of the subject-matter, and upon a collateral attack every presumption will be indulged in support of its judgment. If necessary, therefore, it will be assumed that the former judgment was vacated by consent of the parties, and that an order showing such consent and the vacating of the judgment appears in the minutes of the court."

The same court, in *Parker v. Altschul*, 60 Cal. 380, said:

"All presumptions are in favor of the correctness of the proceedings of courts of general jurisdiction, and as the consent of the defendants would have justified the order of the court, we must presume that such consent was given, there being nothing in the record to show that it was not."

In support of the proposition that a trial court, after entering judgment, commits error if it vacates that judgment for mere error of law, respondent cites *Coyle v. Seattle Electric Co.*, 31 Wash. 181, 71 Pac. 733. In that case, however, the party aggrieved appealed from the order of vacation, and the entire record and attending facts were thus brought up for review. In this case respondent neither appealed from the order of vacation nor attacked it in the court below. The case cited is, therefore, not applicable here. In the absence of an appeal from the order of vacation, or of a direct attack thereon, the presumption as to regularity, within the authorities above cited, must obtain. The order of vacation was a final one affecting a substantial right of respondent with respect to the extension of the time within which appellants could appeal, and it was therefore appealable. *State ex rel. Cleek v. Tallman*, 38 Wash. 132, 80 Pac. 272. Moreover, while the last order remained in force, the first one, which had been set aside, was *functus officio*, and was one from which appellants could not appeal. The first dismissal had been set aside. The last order dismissed the petition, and it was the one in force. It is the

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dismissal of the petition of which appellants complain, and they were therefore required to appeal from the last order and not from the first which, as the record stood, was without vitality.

"So long as this last judgment remains in force, and not appealed from, the first order is not the subject of appeal; since it would be of no service to the appellants to reverse the first order, and leave in force the last order affirming it." *Horn v. Volcano Water Co.*, 18 Cal. 141.

See, also, *Luck v. Hopkins*, 92 Tex. 426, 49 S. W. 360; *Keystone Iron Works Co. v. Douglass Sugar Co.*, 55 Kan. 195, 40 Pac. 273. For the foregoing reasons, the motion to dismiss the appeal is denied.

It is urged by appellants that the court erred in dismissing their amended petition contesting said alleged will. One ground of the dismissal was that the petition was not filed within one year after the entry of the decree of probate. It will be remembered from the preliminary statement herein that the original petition in contest was filed long within the year, and that respondent answered that petition. A second petition was also filed within the year, but soon after the expiration of the year respondent moved to strike it because not properly verified. This motion was granted by the court, but accompanied with the express condition that appellants should have leave to amend. They did amend the verification by simply stating that the petitioners were nonresidents and not within King county. The petition so amended was filed after the expiration of the year from the date of the order admitting the alleged will to probate.

Appellants argue with much force that the statute authorizing the contest of wills and outlining the procedure therefor does not require that petitions in such contests shall be verified. It is certain that the statute does not in terms say that a verification is required. We shall not, however, decide that question now, but shall meet the point raised here on respondent's theory that the petition should be veri-

fied in accordance with the general provisions of the code in reference to the verification of pleadings. Bal. Code, § 4955, provides that, "Any pleading not duly verified and subscribed may, on motion of the adverse party, be stricken out of the case." The petition which was stricken was both subscribed and sworn to by counsel. It was not "duly" verified, in that the reason why counsel verified it was not stated, as required by Bal. Code, § 4925. While the above quotation from § 4955 shows that a pleading not duly verified may, on motion, be stricken, yet the same section provides that, when such motion is allowed, the court may permit the party to file an amended pleading. That is just what the court did in this case. In an ordinary civil action or proceeding it is manifest that jurisdiction is not lost when a pleading is merely stricken and an amendment allowed. The court retains jurisdiction and the action proceeds. We see no reason why it should be held that a different rule applies to the proceedings for the contest of wills. It is true that Bal. Code, § 6110, provides that a contest shall be instituted within one year from the probate of the will, but it was so done in this case, if we assume that the probate decree was valid, and the parties were before the court long before the year expired. The mere fact that the petition was stricken and the amendment permitted after the year expired did not make it a contest instituted after the year. The court already had jurisdiction of the subject-matter and of the parties. By permitting the amendment, and by virtue of the statute allowing it, jurisdiction was retained. Moreover, for reasons which will be hereinafter stated, no valid decree admitting this alleged will to probate was ever entered. For this additional reason appellants were not limited in their time to file their petition to one year from the date of the entry of a decree which was void. We therefore think the court erred in dismissing appellants' amended petition on the ground that the contest was not instituted within one year from the probate of the will.

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The court also granted respondent's motion to dismiss the petition for want of prosecution, and this is also assigned as error. The delay was occasioned by reason of certain proceedings instituted by appellants in the circuit court of the United States for the district of Washington. Respondent contends that, by the institution of said proceedings, appellants in effect abandoned the courts of the state, and that this contest has not been prosecuted in good faith. We shall not undertake to inquire into the motives of appellants in seeking the aid of another tribunal. It is sufficient to say that their contention was regarded by the aforesaid court of sufficient seriousness to lead it to believe that it had jurisdiction to hear and determine a contest over this same alleged will and between the same parties who are litigating in this proceeding. That court determined the matter adversely to this respondent, and issued its injunction preventing her from further asserting any rights under the alleged will. It is true the decision of that court was afterwards reversed by the United States circuit court of appeals, ninth circuit (*Carrau v. O'Calligan*, 125 Fed. 657), and the decision of the last named court was affirmed by the supreme court of the United States. *O'Callaghan v. O'Brien* (U. S.), 25 Sup. Ct. 727. The mere fact that the Federal trial court erred in holding that it possessed jurisdiction did not remove the necessity or propriety for respect to its decree and injunction while the matter remained finally undetermined in the two appellate courts mentioned. Appellants could not proceed with the contest here waged without requiring respondent to violate the terms of the decree of the Federal court by resisting the contest, or without compelling her to simply stand by and allow them to proceed without resistance. Under such circumstances we think it was error to dismiss the petition for want of prosecution. Whatever procedure may have been had in the Federal court, the fact remains that an undetermined contest is pending in the state

court, and we think it is the duty of that court to determine it.

From what has been said it will be seen that the judgment appealed from must be reversed. In anticipation of a reversal, appellants further contend that the record before us discloses that the decree admitting the alleged will to probate is void; that being void, the time has now passed within which the will can be offered for probate, and that in remanding the case this court should so declare, so as to avoid the necessity of a contest. We shall first inquire into the contention that the decree of probate is void. In pursuance of the terms of Bal. Code, § 4606, proof in support of the will was offered to the court within six months after the alleged speaking of the testamentary words. The words were also committed to writing and a citation in form was issued, directed to the widow and next of kin of the deceased. We have seen that the citation was issued on the day that the petition for probate was filed, and was returned by the officer the same day, who recited in his return that such widow and next of kin could not be found in the county. It is conceded that there was neither widow nor child of said deceased, but no service of the citation was made, either personally or otherwise, upon any next of kin. Upon the citation and return aforesaid, the decree admitting the alleged will to probate was entered and all these proceedings occurred in one day. Section 4606, *supra*, requires that a citation shall be directed to the widow or next of kin "that they may contest the will if they think proper." Manifestly some service of the citation, either personal or otherwise, was necessary in order to advise the next of kin so that they might contest the will. Moreover Bal. Code, § 6083, provides as follows:

"In all cases in which citations are issued from the superior court in probate proceedings, they shall be served at least ten days before the term [time] at which they are made returnable, except when issued from the court in cases

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where the law requires the judge to issue them upon his own motion, and he does so issue them; and in such cases they shall be served in sufficient time to allow the person served to be in attendance on the court."

The word "term," as originally used in the statute, is now obsolete by reason of the abolishment of statutory terms of courts, and that word should doubtless now be read as "time," thus making the service necessary at least ten days before the time set for hearing. The citation issued in the case at bar was not only not served, but it was made returnable on the same day it was issued. It was therefore void as process in that it did not conform with important statutory requirements. Without any valid process and without notice or appearance, the court was manifestly without jurisdiction to enter the decree, and it is therefore void. In view of the fact that the record shows that the decree is void for want of jurisdiction to enter it by reason of lack of process, we have passed thereon, because the validity of that decree was involved in the judgment of dismissal from which this appeal was taken. That judgment in effect ratified the validity of the decree and left it of record as establishing the validity of the alleged will. Appellants' petition called to the court's attention the invalidity of the decree, and by its dismissal of the petition the court declined to purge its records of the void decree. The determination of this question also makes clear the present status of the parties in relation to the proof of the proposed will and the contest thereof.

Referring now to appellants' further contention that the time has passed within which the will may be presented for probate, we have to say that the record shows that a petition for its probate was filed within the time required by statute. The alleged testamentary words were reduced to writing and proof in support thereof was "offered" (using the statutory word) within the required time. It then became the duty of the court to cause proper citation to issue

in order that it might be properly served and jurisdiction to hear and consider the offered testimony thereby obtained. The statute does not require that the citation shall necessarily be issued and served within six months after the testamentary words are spoken, but it does require that proof shall be offered within that time. We think, therefore, that respondent proposed the will for probate and offered her proof within the required time, and that she has not lost her opportunity to have her petition and proofs considered by the court. The decree of the court being void, the matter now stands as if no decree had been entered, and the court will hear the matter as on original hearing. The burden of proof in support of the alleged will is upon respondent, and is in no manner shifted to appellants by reason of the void decree. The interested parties having appeared and being now before the court, jurisdiction is vested, and the hearing of proof in support of the alleged will and of evidence in support of the contest thereof can proceed.

Appellants further contend that the record shows that the proposed will is invalid upon its face, in that the alleged spoken words do not constitute a will under the laws of this state, and that a nuncupative will is ineffective when the estate bequeathed exceeds in value the sum of \$200. We are urged by appellants with much earnestness to pass upon these questions at this time. They are matters, however, which have never been passed upon by the trial court after a hearing. They involve the pith of this whole controversy, and are the very matters to be determined by the trial court after a full hearing. Respondent contends that this court has not the power to pass upon those questions now. Even if both parties were now consenting that this court should give its opinion as requested by appellants, it is manifest that it would be no more than advisory, and would not be binding as a judicial decision if the cause should again be brought here on appeal. However much it might serve present con-

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venience to now have the opinion of this court, we do not deem it advisable to depart from the well-known rule governing appellate courts which requires that their decisions on appeal shall be confined to questions which have been duly litigated before and passed upon by trial courts. More especially do we think this rule should obtain with respect to the vital questions which underlie the whole controversy.

The judgment appealed from is therefore reversed, and the cause remanded, with instructions to the trial court to purge its record of the said void decree, and otherwise proceed in accordance with what has been hereinbefore said.

MOUNT, C. J., CROW, and FULLERTON, JJ., concur.

ROOT, J., took no part.

[No. 5563. Decided September 20, 1905.]

THE STATE OF WASHINGTON, *on the Relation of R. M. Dye,*
*Respondent, v. JOHN REILLY, Appellant.*¹

CONTEMPT—VIOLATION OF ORDER—AFFIDAVIT—SUFFICIENCY. An affidavit in contempt proceedings which states that the appellant was restrained by the court from obstructing a highway, and that he afterwards obstructed the same, states sufficient facts to authorize a conviction for contempt.

CONTEMPT—AFFIDAVIT—SUFFICIENCY—VALIDITY OF JUDGMENT UN-APPEALED FROM. Upon a contempt proceeding for violating an order as to the obstruction of a highway, the question as to whether the judgment was void because no highway existed cannot be considered when the judgment was not appealed from.

CONTEMPT—PARTIES PLAINTIFF—MISJOINDER. There is no misjoinder of parties plaintiff, in a proceeding for contempt instituted by the state on relation of the prosecuting attorney, in failing to join the road supervisor or county commissioners, in a prosecution for contempt in obstructing a county road, in violation of an order of court.

¹Reported in 82 Pac. 287.

WITNESSES—PRIVILEGE—GIVING EVIDENCE AGAINST ONESELF—CONTEMPT—CIVIL NATURE. A contempt proceeding is not a criminal case, within the meaning of Const., art. 1, § 9, which provides that no person shall be compelled to give evidence against himself.

SAME—PUNISHMENT WHEN LIMITED TO FINE OF \$100. A contempt for violating an order against the obstruction of a county road cannot be punished otherwise than by a fine not exceeding \$100, under Bal. Code, § 5799.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered October 14, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, adjudging the defendant guilty of contempt of court. Reversed.

H. N. Martin, for appellant, claimed, among other things, a misjoinder of parties plaintiff in that the road supervisors or county commissioners were the proper parties to institute the proceedings.

R. M. Dye, for respondent.

DUNBAR, J.—This is a contempt proceeding. A restraining order was issued out of the superior court of Lincoln county, Washington, on the 5th day of August, 1904, forbidding the appellant from obstructing a certain highway, in Lincoln county. On the 27th day of September, 1904, upon the application and affidavit of the prosecuting attorney of said county, setting up facts showing a violation of said restraining order, an order was made and entered commanding the arrest of the appellant. Warrant for his arrest was issued and served. Upon the trial of the contempt proceeding, the appellant was adjudged guilty of contempt of court, and sentenced to a fine of \$100 and imprisonment in jail for thirty days. From this judgment this appeal is taken.

It is claimed, (1) that the affidavit does not state facts sufficient to charge a crime; (2) that the temporary restraining order which defendant is accused of violating is void and of no effect; (3) that the facts do not support

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the findings; (4) misjoinder of parties; (5) that the defendant was compelled to testify over his objections; and (6) that the judgment is not supported by the law.

The affidavit, we think, amply states sufficient on which to base a conviction. It shows that the appellant was restrained by the court from obstructing the highway, and that he afterwards obstructed the same. The question of whether the temporary restraining order which the defendant is accused of violating was void for the reason that no highway existed, is not before this court for determination, the judgment in that case not having been appealed from. We also think that the facts proved in this case support the court's findings. Neither is there any misjoinder of parties plaintiff. Nor are we prepared to say that the defendant was wrongfully compelled to testify over his objections. This objection is based upon § 9, art. 1, of the state constitution, which provides that no person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense.

The question turns upon the proposition as to whether or not a contempt proceeding is a criminal case. We are constrained to think that it is not, within the meaning of the constitutional provision. This court held, in *State ex rel. Geiger v. Geiger*, 20 Wash. 181, 54 Pac. 1129, that proceedings against defendant as for contempt in refusing to obey the order of the court compelling him to pay alimony upon a decree of divorce, did not constitute a criminal action; that hence the failure to give an appeal bond upon an appeal from an order adjudging the appellant in contempt, was cause for the dismissal of the appellant. It has been held in California that a contempt proceeding is a criminal proceeding, and that the defendant in the proceeding could not be compelled to testify against his own interests. But that decision was under the special provisions of the penal code, which provide that a contempt of court constitutes a misdemeanor, and is therefore not in point in this state, where

there is no similar statutory provision. Our own legislature has evidently construed the constitutional provision as not applying to contempt proceedings, Bal. Code, § 5805 providing:

“The sheriff shall return the warrant of arrest and the bond, if any, given him by the defendant, by the return day therein specified. When the defendant has been brought up or appeared, the court or judicial officer shall proceed to investigate the charge by examining such defendant and witnesses for or against him, for which an adjournment may be had from time to time, if necessary.”

The court, however, in this case we think exceeded its jurisdiction in imposing the penalty of \$100 and thirty days' imprisonment in the county jail. Bal. Code, § 5799, is as follows:

“Every court of justice and every judicial officer has power to punish contempt by fine or imprisonment, or both. But such fine shall not exceed three hundred dollars, nor the imprisonment six months; and when the contempt is not [one] of those mentioned in subdivisions one and two of the last section, it must appear that the right or remedy of a party to an action, suit, or proceeding was defeated or prejudiced thereby, before the contempt can be punished otherwise than by a fine not exceeding one hundred dollars.”

The contempts mentioned in subdivisions one and two above referred to are,

(1) “Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings; (2) A breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceeding.” Bal. Code, § 5798.

It will be readily seen that the contempt in this case does not fall under the provisions of sections one or two. Nor does it appear that the right or remedy of a party to an action, suit, or proceeding was defeated or prejudiced

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Statement of Case.

by the contempt which was committed by the appellant in this action by placing a fence across the highway.

For this error on the part of the court, the judgment will be reversed.

MOUNT, C. J., CROW, HADLEY, and FULLERTON, JJ., concur.

ROOT, J., concurs in the result.

40	221
41	435

[No. 5653. Decided September 20, 1905.]

OTTO EHRHARDT, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS — ACTIONS — PRESENTATION OF CLAIM WITHIN THIRTY DAYS—EXCUSE FOR DELAY—INCAPACITY. A person is not excused from presenting to the city his claim for personal injuries within thirty days as required by the charter, where it appears that his injury was a compound fracture of the humerus, that he was capable of going about within sixteen days after the accident, and was mentally capable of attending to some business, and his mind was not so affected but that he could have employed a lawyer to present his claim.

SAME—ATTEMPT TO PRESENT AFTER OFFICE HOURS. An attempt to present a claim on the last day allowed, which failed because the offices of the city were closed between the hours of 5 and 6 p. m., is no excuse for failing to present it in time, when the charter provides that the offices shall be open until 5 p. m.

Appeal from a judgment of the superior court for King county, Griffin, J., entered November 28, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for personal injuries. Reversed.

William Parmelee (*Scott Calhoun*, of counsel), for appellant.

William Martin, for respondent.

¹Reported in 82 Pac. 296.

DUNBAR, J.—On the 10th of September, 1902, respondent was injured by being thrown from his wagon while driving along a public street, in the city of Seattle. On the 11th day of October following, he filed with the clerk, and presented to the city council, his verified claim for damages. Thereupon he commenced his action against the city to collect his damages for which his claim was filed. The trial was by the court, and resulted in a judgment for the respondent. From this judgment this appeal is taken.

The principal error alleged, and the only one it is necessary for us to discuss by reason of the conclusion reached on such alleged error, is that more than thirty days elapsed after the injury before the claim was presented to the city of Seattle. One of the findings of the court was that, for more than thirty days after he was injured, the plaintiff suffered great pain and was disabled from attending to or transacting any business, and was confined to his bed the greater portion of said time, and that, within a reasonable time after his said injury, he presented his claim to the city of Seattle, and attempted to present it on the 10th day of October, 1902, but was prevented by reason of the offices of said city being closed at between the hours of 5 and 6 o'clock, p. m., and the said city and its officers had full knowledge prior thereto of the said injuries sustained by the plaintiff.

We are forced to conclude, from a reading of the record, that this finding was not entirely justified; that, while the plaintiff suffered great pain a portion of the time during the thirty days immediately succeeding the accident, and may have suffered some pain all the time, he was not disabled from attending to or transacting any business. The record shows, that he did attend to other business; that he gave instructions in relation to the care of his team; that sixteen days after he was injured, and frequently thereafter, he called upon the doctors, whose offices were seven or eight blocks from where he lived; that he would take a car to

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Second and James street, then walk to the office building, take the elevator and go to his doctor's office without any trouble and that he looked after matters generally in a way that shows that he was not incapacitated from giving the notice required by the charter—the charter provision being that the notice of injury in such cases should be within thirty days from the day of the accident. The damage which he sustained was a compound fracture of the humerus of the left arm; and while no doubt it was painful, it cannot be gathered from the plaintiff's own testimony, which is the strongest testimony on the subject, that his mind was so affected that he could not have employed an attorney to present his claim, as he did on the day on which it was presented. A person might be incapacitated from being physically present at the presentation of a claim of this kind, but that could not justify him in not presenting the claim seasonably, if he were mentally capable of having the claim presented for him. We said, in *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386, where this question was raised and discussed:

“We think the general rule is that it must be shown that there is such physical or mental incapacity as to make it impossible for the injured person to procure the notice to be served, and, if there is an actual incapacity, it makes very little difference in reason whether the incapacity is mental or physical.”

We cannot gather from the record that there was an actual incapacity on the part of the plaintiff. On the contrary, it appears that the failure to present the claim within the time prescribed by the charter was simply neglect.

The latter part of the finding of the court above referred to, viz., that he attempted to present it on the 10th day of October, 1902, but was prevented by reason of the offices of said city being closed at between the hours of 5 and 6 o'clock, p. m., is not a material finding which can aid the respondent in this case, for the record shows that the office

hours prescribed by the charter were from 9 o'clock, a. m., to 5 o'clock, p. m., and the presentation of the claim after office hours would not be notice to the city. The respondent, not having presented a claim within the time prescribed by the charter, was legally barred from prosecuting the claim.

The judgment will therefore be reversed, and the cause dismissed.

MOUNT, C. J., CROW, HADLEY, FULLERTON, and ROOT, JJ., concur.

[No. 5605. Decided September 20, 1905.]

EMIL LARSON, *Appellant*, v. AMERICAN BRIDGE COMPANY
OF NEW YORK, *Respondent*.¹

EVIDENCE—AGENCY—HEARSAY. Upon an issue as to whether plaintiff's employer, one G, was an independent contractor or merely the agent of the defendant (the principal contractor in the construction of a building), the declarations of G are inadmissible for the purpose of showing that he was merely an agent.

CONTRACTS—CONSTRUCTION. The construction of a written contract which is unambiguous, is a question for the court, without submission to a jury.

MASTER AND SERVANT — INDEPENDENT CONTRACTOR — NEGLIGENCE — LIABILITY OF ORIGINAL CONTRACTOR TO SERVANTS OF SUBCONTRACTOR. Subcontractors for the erection of a structure under a written contract whereby they have sole charge of the erection work, entirely controlled its method, and employed the men, are independent contractors, and the original contractor is not liable to those engaged upon the work for personal injuries due to the neglect of the subcontractors, since the relation of master and servant does not exist; and the retention of the right to supervise the work for the purpose of merely determining whether it is done according to the contract does not affect the independence of the relation.

TRIAL—SPECIAL INTERROGATORIES—NO EVIDENCE TO SUSTAIN ANSWERS—ESTOPPEL—CHALLENGE TO SUFFICIENCY OF EVIDENCE—WHEN NOT WAIVED. Requesting the submission of special interrogatories

¹Reported in 82 Pac. 294.

40	224
41	256
e41	550
e41	552

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does not make the answers binding, where there was no evidence to sustain the findings, and the defendant had challenged the sufficiency of the evidence by motions for nonsuit and for a directed verdict for insufficiency of the evidence.

APPEAL—DECISION—GIVING RESPONDENT BENEFIT OF ERROR. Where there was no evidence to sustain a verdict against the defendant and his challenge to the evidence was improperly overruled, but a verdict for the plaintiff was set aside and a new trial granted on other grounds, the defendant is entitled, on appeal by the plaintiff, to a dismissal of the case.

Appeal from an order of the superior court for Spokane county, Belt, J., entered November 16, 1904, setting aside the verdict of a jury rendered in favor of the plaintiff, and granting a new trial, on motion of the defendant. Affirmed in part and reversed in part.

Robertson, Miller & Rosenhaupt, for appellant.

Graves, Palmer, Brown & Murphy, for respondent.

HADLEY, J.—This is an action to recover damages for personal injuries. The defendant Centennial Mill Company is the owner of a flour mill, situate in the city of Spokane. The complaint alleges, that said defendant was engaged in the construction of certain steel storage wheat tanks, adjacent to its mill; that the defendant American Bridge Company of New York carries on the general business of constructing iron and steel structures within the state of Washington, and was engaged in the construction of said tanks as a contractor, subject to the control of its codefendant; that the plaintiff, as a structural iron worker, was in the employ of the defendants, engaged by them to work upon the construction of the tanks; and that, while so at work, he was injured by reason of the falling of a platform, owing to the negligence of the defendants.

The mill company answered, that it entered into a contract with its said codefendant, whereby the latter was to furnish and deliver all material, and was to manufacture

and erect the said steel tanks; that the mill company under said contract had neither authority to employ the plaintiff nor to exercise any supervision over him, nor any other person employed in the erection of the tanks; and that the plaintiff was working for other persons who were independent contractors. The codefendant, the American Bridge Company, also denied that plaintiff was in its employ, and alleged that he was working for other persons who were independent contractors.

The cause was tried before a jury. At the close of the testimony submitted by the plaintiff, the defendants each challenged the sufficiency of the evidence, and moved that the case be withdrawn from the jury, and that judgment of dismissal be entered as to each defendant. The motion was granted as to the Centennial Mill Company, but denied as to the American Bridge Company. The latter then submitted its testimony and, at the close of all the testimony, renewed its challenge to the evidence, and again moved for judgment of dismissal. The challenge and motion were denied, and the cause was submitted to the jury under instructions. A verdict was returned in favor of plaintiff. The verdict was afterwards set aside on motion for new trial, and a new trial granted. From the order granting the new trial, the plaintiff prosecutes this appeal.

It is assigned that the court erred in granting the new trial. The record shows that the court granted the new trial on the theory that there was no competent evidence showing that appellant was employed by, or was working for, the American Bridge Company at the time of the accident. It was contended below, and is contended here, that there was such evidence. We think, however, that the evidence wholly showed that the American Bridge Company sublet the contract for the erection of the tanks to Gerrick Brothers, and that appellant was in the employ of the latter. It is our view that there was no competent evidence to the contrary. It is true, the court permitted appellant to testify,

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over respondent's objection, that one of the Gerricks said to him, in effect, that the American Bridge Company was doing the work, and that he (Gerrick) was working for said company. We think the evidence admitted as aforesaid was clearly inadmissible. It was merely testimony concerning the declaration of said Gerrick as to his own agency for the American Bridge Company. This court has repeatedly held that the declaration of an agent is not admissible to establish his agency. *Comegys v. American Lumber Co.*, 8 Wash. 661, 36 Pac. 1087; *Western Security Co. v. Douglass*, 14 Wash. 215, 44 Pac. 257; *Gregory v. Loose*, 19 Wash. 599, 54 Pac. 33.

Appellant alleged in his complaint that he was in respondent's employ, and the burden was upon him to show that fact. The testimony, however, showed that respondent was not engaged in the actual erection of the tanks, but that the work was being done under subcontract by Gerrick Brothers, and that appellant was in their employ. The contract between respondent and Gerrick Brothers was in writing, was unambiguous, and should have been construed by the court without submission to the jury. Respondent has cited numerous authorities upon this point, but the proposition is so generally established by authority that we shall not reproduce the citations here. Under said contract, Gerrick Brothers entered upon and prosecuted the work of erecting the tanks, and were so engaged when appellant, as their employee, was injured. One of the Gerricks so testified at the trial, the other having died from injuries received in the same accident. The Gerricks had sole charge of the erection work, controlled the method of doing it, and employed the men for that purpose, of whom appellant was one.

Were they independent contractors? The general test which determines the relation of independent contractor is that he shall exercise an independent employment, and represent his employer only as to the results of his work and

not as to the means whereby it is to be accomplished. The chief consideration is that the employer has no right of control as to the mode of doing the work; but a reservation by the employer of the right to supervise the work, for the purpose of merely determining whether it is being done in accordance with the contract, does not affect the independence of the relation. 16 Am. & Eng. Ency. Law (2d ed.), 187, 188. Where the means by which the work is to be accomplished are entirely under the control of the subcontractor, where he alone employs the servants who aid in the construction work, and where the original contractor is not shown to have been negligent in the selection of the subcontractor, or in furnishing defective material, or otherwise, the subcontractor becomes an independent contractor, and his employer is not liable for injuries arising from the former's neglect. Under such circumstances there is no privity between the original contractor and injured persons. In the case of employees, the relation of master and servant does not exist between the original contractor and those engaged upon the work as employees of the independent contractor. The doctrine of *respondeat superior* does not apply. In support of these general principles see, *Ziebell v. Eclipse Lumber Co.*, 33 Wash. 591, 74 Pac. 680; *Miller v. Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1089; *Aldritt v. Gillette-Herzog Mfg. Co.*, 85 Minn. 206, 88 N. W. 741; *Hughbanks v. Boston Inv. Co.*, 92 Iowa 267, 60 N. W. 640; *Pioneer Fireproof Const. Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17. Respondent cites many other cases, a number of which are also cited in the opinions above mentioned. In consideration of the authorities defining and applying the doctrine of independent contractor, we think all the evidence in this case shows that Gerrick Brothers were such. Appellant having been in their employ, no privity existed between him and respondent, and the latter is not liable.

Respondent submitted special interrogatories to the jury on the question of independent contractor. The jury an-

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swered them against respondent, and appellant urges that respondent is now estopped from claiming that there was no evidence in support of the verdict and findings of the jury. Appellant cites, *Dixon v. Bausman*, 17 Wash. 304, 49 Pac. 540, and *Mitchell v. Matheson*, 23 Wash. 723, 63 Pac. 564. We think the cases are not controlling here, for the reason that it does not appear in either case that either a motion for nonsuit or challenge to the evidence was interposed. And moreover, in each case the opinion shows that there was evidence in support of the findings, which we have seen is not true in the case at bar. Respondent seasonably challenged the sufficiency of the evidence, both at the close of appellant's testimony and also at the close of all the testimony. Having been overruled, it was compelled to yield to the view of the court, and the mere fact that it submitted special interrogatories should not make the answers binding when there was no evidence whatever to support them. The fact that the jury answered the questions with no evidence upon which to base the answers does not make them binding, but shows that the jury were not unbiased, and for that reason the findings should be set aside. *Atchison etc. R. Co. v. Hine*, 5 Kan. App. 748, 47 Pac. 190; *Southern Kansas R. Co. v. Michaels*, 49 Kan. 383, 30 Pac. 408; *Jeffrey v. Keokuk etc. R. Co.*, 51 Iowa 439, 1 N. W. 765; *Waterbury v. Chicago etc. R. Co.*, 104 Iowa 32, 73 N. W. 341.

When ruling upon the motion for new trial, the court stated that, as there was no competent evidence whatever to sustain the findings, they would be set aside. The court was then convinced that it had misapprehended the evidence at the time respondent interposed its challenge thereto. Such was clearly the case, and it was not error to set aside the findings and also the general verdict.

Respondent asks, inasmuch as the evidence shows no cause of action against it, that the cause shall be remanded with instructions to dismiss the action. We think this request

should be granted. Respondent was entitled at the trial to have its challenge to the evidence sustained, and it is still entitled to it. *Bernhard v. Reeves*, 6 Wash. 424, 33 Pac. 873.

The action of the court in setting aside the verdict is affirmed; but the cause is remanded with instructions to vacate so much of the order as grants a new trial, and to enter a judgment dismissing the action.

MOUNT, C. J., DUNBAR, and CROW, JJ., concur.

ROOT and FULLERTON, JJ., took no part.

[No. 5669. Decided September 22, 1905.]

PETER JANCKO, *Respondent*, v. WEST COAST MANUFACTURING & INVESTMENT COMPANY, *Appellant*.¹

APPEAL — DECISION — LAW OF CASE. Questions decided upon a former appeal become the law of the case upon a second appeal.

MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANTS. No question of fellow servant is involved where an inexperienced man is injured through a failure to instruct and warn him, while obeying the order of the operator from whom he was instructed to take orders.

MASTER AND SERVANT—NEGLIGENCE—EVIDENCE. There is sufficient evidence that an injury to an inexperienced employee, sustained in attempting to remove a slab from a saw, was due to the vibration of the saw when he so testifies, and is corroborated by expert testimony of a substantial vibration by a saw so placed and operated.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 22, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in attempting to remove slabs lodged near a saw. Affirmed.

G. M. Emory, for appellant.

Aust & Terhune, for respondent.

¹Reported in 82 Pac. 284.

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Opinion Per DUNBAR, J.

DUNBAR, J.—This is an action for personal injuries. It is alleged, that the plaintiff, an inexperienced man, entered the employ of the defendant in his shingle and saw mill as an assistant to a knee-bolter, and that the foreman of the defendant told the plaintiff that he should take his instructions from the knee-bolter, whose assistant he was; that on the second day of the plaintiff's employment a certain slab became clogged under the knee-bolter saw, between the saw and the frame in which it ran; that the plaintiff was about to remove the slab by means of a stick, when the knee-bolter stopped him and instructed him as to the proper way to remove the obstruction, by telling him that it should be done by inserting his arm in the narrow space between the saw and the frame, and removing the slab with his fingers. It was also alleged that the opening through which the slabs fell from the sawn bolt was too narrow, and that the conveyor, intended to carry off the refuse, was also not wide enough; that the dangers specified were not known to the plaintiff, and were not obvious; that, by reason of the plaintiff's following the instructions of the knee-bolter, he was injured and lost three of his fingers, the slabs catching the teeth of the saw, which was thereby caused to vibrate from side to side. As a result of the trial, judgment was rendered in favor of the respondent for \$1,500.

This cause has been before this court before, and is reported in 34 Wash. 556, 76 Pac. 78. In that case a nonsuit was granted by the lower court, and this court reversed the judgment and remanded the case for trial. It is contended by the appellant that the only ground upon which the case was reversed was that there was sufficient evidence of the vibration of the saw to sustain a verdict, and that therefore that question should have been submitted to the jury, and that, inasmuch as there was no proof of vibration in the last trial, the court erred in denying the challenge to the sufficiency of the evidence. But an examination of the opinion of the court in the former case shows that the

decision was not so limited but that it was held that the question of negligence and contributory negligence should have been submitted to the jury. In the course of the opinion it is said:

"It was for the jury, and not for the court, to say whether respondent was negligent in failing to give appellant more specific instructions, and to warn him as to the danger from the vibration of the saw, if it should strike a slab or piece of timber, as it did. It was also for the jury to say whether, under the testimony, the device furnished by respondent was defective for the purpose, and also whether there was negligence in failing to provide sufficient light. It has been so often held by this court that the question of contributory negligence is ordinarily for the jury that it seems unnecessary to cite the cases upon that subject. The only exception to the rule is that the facts must be such as show want of care to that degree which leaves no room, in the minds of reasonable men, for difference of opinion. We do not view the testimony submitted by appellant as presenting such facts."

And upon the question of obvious danger, it was said in reference to the case of *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191:

"It was there shown, by the cases cited and discussed, that the two [master and servant] do not stand upon equal footing, even when they both have knowledge of the danger; that the position of the servant is one of subordination and obedience to the master, and that when the master orders the servant to perform certain work, the latter has a right to rely upon the superior knowledge and skill of the former, and to assume that the master, with such superior knowledge, will not expose him to unnecessary peril; and, though the servant has some knowledge of the danger, his right of recovery will not be defeated if, in obeying the order, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances."

All the questions raised in this case were decided in that, and such decision becomes the law of the case. There was no question of fellow servant discussed or decided in that

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case, because neither that record nor this presents any such question, the testimony being uncontradicted that the respondent was instructed by appellant's foreman to take his instructions from the operator of the knee-bolter, which he did and which instructions he followed.

But, even if it should be conceded that the cause was reversed solely for the purpose of submitting the question of vibration of the saw to the jury, we are unable to agree with the contention of the appellant that there was no testimony tending to establish the fact that the injury sustained by the respondent, was caused by the vibration of the saw. The respondent testified time and again that such was the case, and while he could not see the teeth of the saw enter his flesh, if he did not change his hand from the time he put it in the space between the saw and the frame, he might conclude with reasonable certainty that the saw had changed its relative position. At least, the testimony was sufficient to go to the jury, especially in view of the expert testimony of Beeson that such a saw as the one in question would vibrate from one to three inches when coming in contact with a slab, and of other expert witnesses all of whom testified to a substantial vibration by a saw placed and operated as the saw in question was placed and operated.

The court did not err in refusing to sustain the challenge to the sufficiency of the evidence, and the judgment is therefore affirmed.

MOUNT, C. J., CROW, and HADLEY, JJ., concur.

Root, J., concurs in the result.

[No. 5628. Decided September 25, 1905.]

FRANCIS M. GUYE, *Appellant*, v. CHARLES E. PLIMPTON
*et al., Respondents.*¹

HUSBAND AND WIFE—PROPERTY—REAL ESTATE HELD BY WIFE IN TRUST FOR SON—ACTION BY HUSBAND TO RECOVER FOR COMMUNITY—CHARACTER OF PROPERTY—EVIDENCE—SUFFICIENCY. Upon an issue as to the character of certain property claimed by the wife as held in trust for her son, and by the husband as community property, findings in favor of the wife are warranted, where it appears that in 1871, \$1,200 came into their possession for the son from his grandfather's estate, that the property in question was conveyed to the wife in 1876, and the wife's claim that she held it in trust for the son was corroborated by evidence of the real estate agent who negotiated the sale, and of other creditable witnesses, to the effect that many years before she refused to mortgage the same for that reason, and her statements to the same effect made in the presence of witnesses were not disputed by the husband, and the property was often spoken of in the family as such individual estate.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 1, 1904, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to cancel a deed, and quiet title. Affirmed.

Piles, Donworth, Howe & Farrell (Dallas V. Halverstadt, of counsel), for appellant.

Tucker & Hyland, for respondents.

Root, J.—Appellant and respondent E. W. P. Guye intermarried March 21, 1872, and have ever since been, and now are, husband and wife. Respondent Plimpton is a son of Mrs. Guye by a prior marriage with one Josiah Plimpton. Subsequent to the marriage of Mr. and Mrs. Guye, there came into her hands certain money, which had some years theretofore been left by their grandfather to said respondent Plimpton and his brother. This brother, Frank T. Plimp-

¹Reported in 82 Pac. 596.

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Opinion Per Root, J.

ton, died September 18, 1871, leaving these respondents as his only heirs. The amount of money received as aforesaid is claimed to have been \$1,200. It is maintained by respondents that this money was used by appellant in his business transactions.

On the 18th of January, 1876, one Curtis D. Brownfield by deed conveyed to respondent Mrs. Guye, lot 2, of block 5, of the town, now city, of Seattle, as laid out and platted by A. A. Denny, and known as A. A. Denny's addition to Seattle, said property being the subject-matter of this controversy. It is claimed by appellant that this property was paid for with community funds, and became, and has always remained, the community property of appellant and Mrs. Guye. Respondents, however, contend that said property was conveyed to Mrs. Guye for the express purpose of being held by her as the property of her said son Charles E. Plimpton, and that it was the intention and understanding that said property should take the place of the money which she had received for said Plimpton from his grandfather's estate, and which money she claims was used by her husband, this appellant, in his business affairs.

On the 16th day of December, 1902, respondent Mrs. Guye, by warranty deed, conveyed said property to her said son, Plimpton, and the said deed was filed for record on the same day in the office of the county auditor of King county. Immediately upon the execution and delivery of said deed, said Plimpton went into possession of said property, and has continuously retained the possession ever since. On the 19th day of June, 1891, appellant filed in the office of the auditor of King county, and caused to be recorded therein, a certain instrument purporting to give notice that the property herein involved was the community property of himself and wife.

This action was instituted by appellant to recover possession of said premises, to set aside and cancel the deed from Mrs. Guye to the respondent Plimpton, to require a recon-

veyance to respondent Mrs. Guye, and to restrain said Plimpton from making any further claim of right, title, or interest in or to said property, and restraining respondent Mrs. Guye from making any claim thereto other than her community right, and adjudging the property to be the community property of appellant and respondent Mrs. Guye, and for other relief. At the close of the trial, findings of fact and conclusions of law were made favorable to respondents, and a judgment and decree in their favor was entered. From this judgment and decree, appeal is taken to this court.

The paramount issue presented here is as to whether this lot was acquired as community property, or as property to be held in trust for respondent Plimpton. Appellant can recover only in the event of its being established that the same was acquired as community property. The evidence given by appellant and by respondent Mrs. Guye is very conflicting. Upon many points their testimony is irreconcilable. There are discrepancies in the testimony of each, and there are portions that seem inconsistent with established and conceded facts in the case. This, however, need not constitute a matter of surprise when we remember that many of the transactions testified to occurred many years ago. In recalling various events transpiring at different times throughout a period of over twenty years, it would be remarkable if the infirmities of memory were not made manifest. Upon the main question, we find much more to corroborate the testimony of Mrs. Guye than that of appellant. It would be impracticable to make a complete analysis of the evidence in this case, but a few references to certain portions of corroborative evidence may not be amiss.

E. F. Blaine, a well-known and reputable attorney of Seattle, was placed upon the witness stand, and testified to a conversation participated in by appellant, Mrs. Guye, and himself, in the year 1887, wherein the title to this property was under consideration. Mr. Blaine testified that he was

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at said time acting as attorney for a bank that was about to make a loan to appellant. He (Blaine) had prepared a note and mortgage, and had called upon Mr. and Mrs. Guye for the purpose of having the same executed. He testified that Mrs. Guye refused to sign the mortgage, because, with other property, it covered the particular lot involved in this suit; that she then and there gave as her reason for refusing that she held the legal title in trust for the benefit of her son, this respondent Plimpton, and that the same had been paid for with money belonging to said Plimpton; that she made these statements in the presence of appellant and witness, and that appellant in no manner disputed her, but discussed the matter upon the assumption that the facts were as she had stated, urging her that it would be all right, and would be the means of saving them great loss, if the loan could be negotiated; that he, Mr. Blaine, became convinced, and so informed them, that he did not think she had a right to mortgage this piece of property, and refused to take the acknowledgment of the mortgage with said property described therein. Appellant denies this conversation.

One Angus Mackintosh, in a deposition, stated that when this property was purchased from Brownfield, he (Mackintosh) negotiated the purchase at the instance and request of respondent Mrs. Guye; that, during said negotiations, he had repeated conversations with her, and that all the negotiations were with her and Mr. Brownfield, and no one else; that Mrs. Guye at said time told him she had money belonging to her son, and she wanted to put that money into that property as an investment for him.

One W. D. Perkins, the nephew of Mrs. Guye and cousin of respondent Plimpton, was upon the witness stand, and testified that, some fourteen years ago, he lived during one winter in the home with appellant and Mrs. Guye, and had been living in Seattle ever since, and was well acquainted with them; that this lot was always spoken of and considered in the family as the property of Mrs. Guye; that she had

frequently spoken of it, and seemed to feel a pride in the fact of owning it as individual property; that in thus speaking of it in the presence of appellant, the latter never disputed her statements, and that he (Perkins) had never heard her title questioned by Mr. Guye.

In view of this corroborative evidence, and in the light of all of the evidence in the case, the trial judge, having the witnesses before him, reached the conclusion that the contention of appellant regarding the title to this lot was not maintained. We do not find justification for a different conclusion.

The judgment of the superior court is therefore affirmed.

MOUNT, C. J., CROW, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

[No. 4896. Decided September 25, 1905.]

E. J. DYER, TRUSTEE, *Appellant*, v. THE MIDDLE KITTITAS
IRRIGATION DISTRICT OF KITTITAS COUNTY,
WASHINGTON, *Respondent*.¹

CONTRACTS—MODIFICATION BY PAROL. It is error to submit to the jury an issue as to whether a contract for the construction of an irrigating canal was modified by an oral agreement whereby the contractor agreed to carry on the work at his own expense, where the evidence, while showing that both parties believed that bonds would be ultimately issued, did not tend to prove a modification of the contract.

CONTRACTS—ESTIMATE OF ENGINEER—ENGINEER'S CONSTRUCTION OF TERMS—CONCLUSIVENESS—MISTAKE. A contract for the construction of an irrigating canal providing that the estimates made by the engineer shall be conclusive unless impeached for fraud, and that his decision defining the meaning and intent of the plans and specifications shall be final, refers to doubtful terms in the plans and specifications and does not give the architect power to define the plain terms of the contract; and an allowance by him for material strung

¹Reported in 82 Pac. 301.

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along the line of the canal, which the contract required to be "delivered and in place," will be held to be a "mistake," which the courts will correct by deducting the sum allowed therefor in the engineer's estimate.

INSTRUCTIONS—EXCEPTIONS BY RESPONDENT—LAW OF CASE. Where instructions are not excepted to by respondents, they are binding upon them as the law of the case.

Appeal from a judgment of the superior court for Kittitas county, Rudkin, J., entered April 1, 1903, upon the verdict of a jury rendered in favor of the defendant, after a trial on the merits, in an action on contract. Reversed.

Graves & Englehart, and *Voorhees & Voorhees*, for appellant.

Pruyn & Slemmons and *Kauffman & Frost*, for respondent.

PER CURIAM.—In this action the appellant, as assignee of one Peter Costello, sought to recover from the respondent the sum of \$43,713.18, alleged to be due for labor and materials, furnished the respondent by Costello in the construction of a certain irrigating ditch or canal, under a written contract entered into between Costello and the respondent. The contract under which the work was performed provided, among other things, that Costello should furnish all the necessary labor and materials, and construct the canal according to certain plans and specifications therein referred to, and to the satisfaction of the engineer in charge, and the approval of the board of directors of the respondent corporation; the respondent agreeing to pay the contractor for his labors at fixed rates per cubic yard for the necessary excavations, and fixed prices for each several article of material furnished. The contract further provided that estimates should be made monthly, by the engineer in charge, of the amount of work done and material delivered and put in place during the preceding month, and that the contractor should be paid ninety per centum of the amount

of such estimates, monthly, until the completion of the work, when a final estimate of the amount of work done should be made, and the balance ascertained and paid him; the respondent specially reserving the right to suspend the work at any time it saw fit, on giving ten days' notice, in which case it agreed to pay the contractor in full for all work done and materials furnished up to that time, at the rates provided for in the contract. It was also specially provided that the engineer should define the meaning, intent, and purport of the plans and specifications, and that his decision in all cases should be final.

The question of the sufficiency of the complaint was before this court in 25 Wash. 80, 64 Pac. 1009, where the facts stated were held sufficient to constitute a cause of action. After the cause was remanded, the respondent answered, putting in issue all of the material allegations of the complaint, and setting up, affirmatively, fraud in the performance of the work by the contractor, and fraud and collusion between the engineer and the contractor in making the estimates on which the action was based, by means of which a much larger sum was shown to be due on the estimates than would be due, had the estimates been made upon an honest computation of the work actually performed, and materials delivered and in place. The answer also set up an oral modification of the original contract, to the effect that the respondent, having become convinced that it would be unable to make the payments called for in the contract, at the times agreed upon, owing to its inability to sell the bonds from the sale of which it expected to obtain the necessary funds, notified Costello to cease work on the canal; whereupon Costello, being anxious to continue in the work, proffered to continue it at his own cost and expense, without liability on the part of the respondent other than for such sum as it should realize from the sale of its bonds, he agreeing to assume all of the risk and peril of a failure

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to sell the bonds; and that the work and materials, to recover which this action is brought, were performed and furnished under such modified agreement. The reply denied the affirmative matter contained in the answer.

On the issues thus made, a trial was had before a jury, in which, at the conclusion of the evidence, the appellant moved the court to discharge the jury, and render judgment in his favor, according to the demand of the complaint. This motion the court denied, submitting the case upon all of the issues to the jury, who returned a general verdict for the respondent. The appellant thereupon moved for a new trial, and for judgment in his favor notwithstanding the verdict. Before the motions were passed upon, the motion for new trial was withdrawn, and the rights of the appellant submitted upon the other motion. This motion was overruled, and judgment entered on the verdict.

The principal questions discussed in the briefs, and at the bar, relate to the rulings of the court refusing to direct a judgment in appellant's behalf. It is claimed that there was no substantial conflict in the evidence as to the amount due the appellant, and that there was no evidence to substantiate that part of the answer averring an oral modification of the original written contract. On the latter of these contentions, we agree with the appellant. The evidence did not tend to prove a modification of the contract. Undoubtedly, both parties believed that the bonds would be ultimately sold, and that the money due the contractor would be forthcoming from that source, and it may be that the contractor was more optimistic in this regard than were the officers of the respondent; but the evidence falls far short of establishing the proposition that the contractor undertook and agreed to finish the work at his own cost and expense, without liability on the part of the respondent, other than for such sums as it should realize from the sale of its bonds. It would serve no useful purpose, however, to set out the testi-

mony by which it was sought to establish this averment, and we shall not review it further.

As to the amount due the appellant, respondent claims that there was a sufficient dispute in the evidence to require the submission of this question to the jury. The appellant contends that this question was settled by the estimate made by the engineer, which, he argues, was conclusive upon all parties, unless impeached for fraud. The contract provides that the engineer shall define the meaning, intent, and purport of the plans and specifications, and that his decision in all cases shall be final; but this, it is plain, refers to the interpretation of doubtful and uncertain terms of the contract, not to the question of law presented by the language of the contract or specifications. This clause does not confer upon the engineer the power to vary the meaning of plain terms used in the contract, for if this were so, there would be no need of the writing, as the engineer's arbitrary assertion would be all-sufficient. Doubtless the estimate made by the engineer is *prima facie* evidence of the facts therein recited, but in the absence of a direct recital in the contract making it conclusive evidence of such facts, it would be going too far to hold it so, except in the absence of fraud or mistake.

Turning to the evidence, the estimate returned shows that the engineer included therein materials, to the value of nearly \$1,935.46, for which the respondent was clearly not liable. The contract, not only in express terms, but from the very nature of the method of payment, provided that the respondent should be liable only for material actually used in the construction of the canal—that is, material “delivered and in place;” yet the estimate included some \$1,935.46 worth of material that was merely strung along the line of the canal. The incorporation and allowance by the engineer of this item in the estimate constituted a “mistake,” which the court is authorized to review. As to the balance of his estimates, there is no evidence establishing any fraud or

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mistake. In his charge to the jury, the trial judge gave, among others, the following instructions:

“(3) There has been received in evidence here an estimate made by the chief engineer of the defendant irrigation district, furnished as provided in the contract and plans and specifications for said work, and I charge you that this estimate is conclusive upon the parties to this action, and is binding upon you as to the amount of work done and materials furnished, and as to the classification of the work done and materials furnished, unless impeached for either fraud or mistake, and unless so impeached you must accept said estimate as true and correct, and the plaintiff will be entitled to recover the aggregate amount shown by said estimate according to the prices and classifications provided in the contract for such labor performed and materials furnished less the payment of \$18,300, admitted to have been made thereon, together with legal interest on said amount from the time that said estimate was furnished to the date of your verdict.

“(4) This, gentlemen of the jury, will be the amount of your verdict in favor of the plaintiff, unless you further find that the contract after its execution and before the performance of the labor and the furnishing of the material for which this action was brought was modified and changed by mutual consent of the parties thereto under the instructions I am about to give you.”

These instructions do not appear to have been excepted to by respondent. They are therefore binding upon it as the law of the case. It follows from what has been said that appellant was entitled to judgment in the full amount of his claim, excepting for the item of \$1,935.46.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to enter judgment in favor of appellant for the full amount claimed in his amended complaint, excepting said item of \$1,935.46 and interest thereon.

[No. 5728. Decided September 26, 1905.]

*In the Matter of the Application of CHARLES B. RUSSELL for
a Writ of Habeas Corpus.*

CHARLES B. RUSSELL, *Appellant*, v. A. F. KEES,
Respondent.¹

HABEAS CORPUS—JUDGMENT OF CONVICTION—CONCLUSIVENESS—OFFENSE COMMITTED ON MILITARY RESERVATION—PLEA OF GUILTY—WANT OF JURISDICTION NOT APPEARING IN RECORD. A conviction, upon a plea of guilty, of an offense in a certain county, is conclusive upon application for a writ of habeas corpus, and cannot be attacked by evidence that the crime was committed on a United States military reservation in said county, over which the state court, in which the conviction was had, had no jurisdiction, where there was nothing before that court to show the fact claimed; since the petitioner waived the defense and is concluded by his plea of guilty and the judgment of conviction.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered May 11, 1905, remanding a prisoner to the state penitentiary, after a hearing on the merits on his application for a writ of habeas corpus. Affirmed.

Oscar Cain, for appellant.

Lester S. Wilson, for respondent.

CROW, J.—On September 10, 1904, an information was filed in the superior court for Clarke county, charging appellant, Charles B. Russell, with stealing one head of neat cattle, and upon a plea of guilty, he was sentenced to a term of three years in the penitentiary at Walla Walla, where he is now confined, serving said sentence. On May 11, 1905, appellant applied, by petition, to the superior court for Walla Walla county, for a writ of habeas corpus, claiming that he was illegally restrained of his liberty by respondent A. F. Kees, warden of the state penitentiary,

¹Reported in 82 Pac. 290.

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and alleging that the crime for which he was serving sentence had been committed upon the United States military reservation, in said Clarke county, over which the superior court of said county had no jurisdiction.

A writ having been issued, respondent made return thereto, showing that an information had been filed in the superior court of Clarke county, charging appellant with stealing one head of neat cattle in said county; that appellant had been duly arraigned and pleaded guilty; that thereupon said court entered judgment, imposing upon him a sentence of three years in the state penitentiary at Walla Walla; that the sheriff of Clarke county had delivered the person of said Russell to the warden of said penitentiary, together with a warrant of commitment, issued out of said superior court of Clarke county; and that respondent, as warden of said penitentiary, was holding appellant under said judgment, sentence, and commitment.

Certified copies of the information, arraignment, plea of guilty, judgment, sentence, and commitment, which are attached to respondent's return as a part thereof, and not denied, show all of said proceedings to have been regularly and legally had and conducted, in and by a court of competent jurisdiction. No reference is made therein to any military reservation, but such records simply show the crime to have been committed in Clarke county. Upon the hearing, the superior court of Walla Walla county refused to discharge the appellant, but remanded him to the custody of respondent, and this appeal has been taken.

Upon the hearing, appellant offered evidence tending to show that he had stolen said one head of neat cattle upon the United States military reservation, in Clarke county, and said evidence was admitted by the trial court, subject to objection, for the benefit of either party upon appeal. The record fails to show affirmatively that the trial judge considered said evidence, but appellant contends it was not considered. Appellant's purpose in offering said evidence

was to support the claim made by him that the superior court of Clarke county had no jurisdiction of the crime charged, for the reason that it was committed upon said United States military reservation, appellant relying on subd. 17, § 8 of art. 1, of the constitution of the United States, and § 1 of art. 25, of the constitution of the state of Washington, to show such want of jurisdiction. Respondent objected to said evidence, for the reason that it made a collateral attack upon the final judgment of a court of competent jurisdiction, in violation of Bal. Code, § 5826, which provides:

“No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following: (1) Upon any process issued on any final judgment of a court of competent jurisdiction. . . .”

As the record of the conviction and commitment of appellant appears upon its face to have been regular, and had in a court of competent jurisdiction, we think respondent's objection was well taken, and that said commitment, issued on said final judgment of said superior court of Clarke county, was conclusive as against appellant. *In re Lybarger*, 2 Wash. 131, 25 Pac. 1075; *In re Nolan*, 21 Wash. 395, 58 Pac. 222; *Smith v. Hess*, 91 Ind. 424. This court, speaking through Hoyt, J., in *In re Lybarger*, said:

“When the officer returns as his authority for holding a prisoner a commitment which shows upon its face that such person is committed by a court of general jurisdiction in pursuance of its final judgment for a crime triable by such court, we think he has brought himself within the provisions of our statute, and that the courts are, by the terms thereof, precluded from inquiring further into the cause of detention; and that neither by having the record set out in the petition, nor by bringing it here by certiorari, can this court look therein to see whether or not the court had jurisdiction in that particular case.”

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The state of Indiana, in its habeas corpus act, has the same provision as Bal. Code, § 5826, *supra*, and in *Smith v. Hess*, *supra*, the supreme court of that state says:

“A judgment by a court of competent jurisdiction, valid upon its face, and a valid commitment under it, is an unanswerable return to a writ of habeas corpus.”

Appellant insists that, in showing said crime to have been committed on the military reservation, he did not contradict the record, as such reservation is situated within Clarke county, in which the venue of the crime was laid; that by said evidence he only sought to show there is a portion of Clarke county over which the courts of the state can exercise no criminal jurisdiction, a fact consistent with every statement of the record. We fail to see any merit in this contention, for, after all, appellant only seeks by evidence of extrinsic facts to attack the jurisdiction of the court, which he cannot be permitted to do. On his trial he might have made a defense to the charge contained in said information, based on facts involved in the claim now presented by him; but, when he pleaded guilty, he waived that defense, and placed himself in the same position he would have occupied had he been convicted by the verdict of a jury and failed to appeal from a judgment entered upon said verdict. The court had jurisdiction of the subject-matter, and also of appellant's person. The question as to where, in Clarke county, the crime was committed, or whether it was committed in said county at all, was an issue of fact to be determined by a jury, on a trial had on said information. Such question did not affect the jurisdiction of the court over either the subject-matter, or the person of appellant, and, having pleaded guilty, he is now in no position to raise any question on an application for a writ of habeas corpus as to the jurisdiction of the court over the *place* where the crime was committed.

Speaking of jurisdiction, Church, in his work on Habeas Corpus, at § 368, says:

"While the writ of habeas corpus cannot be made to take the place of a writ of error, appeal, or certiorari, and cannot have the force or effect of those proceedings, jurisdiction of the person, place, and subject-matter, at least, must exist in order to make a valid judgment, and if either is wanting, the judgment is void, and the imprisonment without authority of law. The question of jurisdiction over the subject-matter is one of fact, to be proved or admitted, as any other fact alleged. Ordinarily, in criminal trials, the jurisdiction of the court over the place where the offense is alleged to have been committed is assumed. If admitted by pleading over, that ends the matter. If traversed, and the jury find that the prisoner committed the offense within the jurisdiction of the court, as alleged, the defendant cannot impeach that finding on habeas corpus by showing that the place where the offense was committed is without the said territorial limits."

See, also, *In the Matter of Francis Robert Newton*, 16 Common Bench 96, in which the first syllabus, which states the substance of the opinion of the court, reads as follows:

"This court has no power to grant a habeas corpus to bring up a prisoner who has been convicted at the central criminal court, on the ground that the offense charged was committed at a place out of the jurisdiction of that court."

In *Ex Parte Terry* (Kan.), 80 Pac. 586, the supreme court of Kansas says:

"Testimony was offered in this proceeding tending to show that the petitioner was not guilty of the offense of which he was convicted; that it was in fact committed in a county other than the one named in the complaint. His plea of guilty was an acknowledgment of the charge made against him, and, even if this were an appeal, the inquiry would be limited to whether the facts charged constituted an offense, and whether the sentence imposed was within the limits fixed by the statute. Certainly the judgment cannot be set aside and the case retried on habeas corpus."

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In *Ex Parte Edgington*, 10 Nev. 215, the petitioner was found guilty of conducting a quartz mill in Virginia City without obtaining a license, as required by an ordinance of said city, and was imprisoned in pursuance of such conviction. On the hearing of his petition for a writ of habeas corpus, proof was introduced tending to show that his quartz mill was outside of the limits of said city, and that he was not liable for said license. The supreme court of Nevada, in refusing a writ of habeas corpus, said:

"The petition for the writ of habeas corpus in this case, and the return thereto, to which there is no exception, shows that the petitioner is detained in custody by virtue of a final judgment of a justice of the peace of Virginia City, convicting him of violating an ordinance of that corporation. It is conceded that the justice of the peace had jurisdiction of the offense charged, as well as of the prisoner, and that a legal ordinance authorizes the judgment. Such being the case, it is made our imperative duty to remand the prisoner by the plain terms of our habeas corpus act (1 Compiled Laws, Sec. 367), and we cannot, without pronouncing an extra-judicial opinion, undertake to decide whether the business of the petitioner was carried on within the corporate limits of Virginia City or not. That was a question to be decided on the trial, and if it was decided erroneously in point either of law or fact, the remedy is by appeal and not by habeas corpus."

The section referred to by the Nevada court as § 367 is almost identical with said Bal. Code, section 5826, *supra*, the Nevada statute providing that it shall be the duty of the judge to remand the petitioner if it shall appear that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree.

We are of opinion that the proceedings of the superior court of Clarke county, as shown by respondent's return, were conclusive in this proceeding as against appellant. The judgment is affirmed.

MOUNT, C. J., ROOT, HADLEY, and DUNBAR, JJ., concur.

[No. 5562. Decided September 26, 1905.]

D. H. WILSEY *et al.*, *Appellants*, v. EDWARD CORNWALL
et al., as *County Commissioners etc.*, *Respondents*.¹

SCHOOLS AND SCHOOL DISTRICTS—ESTABLISHMENT OF NEW DISTRICT—SCHOOL SUPERINTENDENT—POWERS. New school districts may be formed by the school superintendent, containing less than four sections of land, under 3 Bal. Code, § 2277 (Laws 1901, p. 371, § 2), if the district can support six months school per year, and this question is one for the determination of the superintendent.

SAME—APPEAL TO COUNTY COMMISSIONERS. Where, upon appeal to the county commissioners, the decision of the school superintendent that a district can support six months school, is affirmed, the decision is final.

SAME—BOUNDARIES OF NEW DISTRICT—FIXED BY SUPERINTENDENT. The school superintendent has power, upon application, to form a new school district and fix its boundaries, and in so doing is not restricted to the territory specified in the petition.

CERTIORARI—TO REVIEW ESTABLISHMENT OF SCHOOL DISTRICT—COUNTY COMMISSIONERS' DECISION ON APPEAL FROM SUPERINTENDENT—FINALITY. Certiorari does not lie to review the action of the county commissioners on appeal from the establishment of a new school district by the superintendent of schools, where there was neither want of jurisdiction or action in excess of jurisdiction, 3 Bal. Code, § 2275 (Laws 1899, p. 19) providing that its action on void appeal shall be final.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered November 15, 1904, upon quashing a writ of certiorari to review the establishment of a new school district by the county commissioners on appeal from the superintendent of schools. Affirmed.

Allen H. Reynolds, for appellants.

Lester S. Wilson, for respondents.

Root, J.—Certain residents and heads of families of school district No. 5, in Walla Walla county, petitioned the county school superintendent to form a new school district

¹Reported in 82 Pac. 303.

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from a portion of said district 5, designating and describing in said petition the land which they desired to have set aside for such new school district. Upon hearing said petition, the county superintendent of schools made and entered an order whereby he assumed to establish a new school district, which he designated as school district No. 73, consisting of less than four sections of land, and about seven hundred acres less than the amount of territory described in the petition. Appellants, being of said petitioners, thereupon appealed to the board of county commissioners of said county, which board, after a hearing, sustained the action of the school superintendent.

Appellants thereupon applied to the superior court in said county for a writ of review, directing the defendants to certify their proceedings to said court for examination. A motion was made to quash this writ, which motion was sustained, upon the ground that said writ had been improvidently issued, and that the affidavit on which the same was based did not state facts sufficient to justify the issuance of the writ. From this order and judgment, an appeal is taken to this court.

Appellants maintain that the action of the county school superintendent and board of county commissioners should be reviewed for two reasons: (1) Because the district, which the superintendent attempted to create, consists of less than four sections of land; (2) because neither the superintendent nor the commissioners had jurisdiction to form any district other than the one prayed for in the petition.

As to the first point, the statute invoked does not appear to sustain appellants' contention. A portion of 3 Bal. Code, § 2277 [Laws 1901, p. 371, § 2], relied on by appellants, reads as follows:

"In forming new districts, or transferring territory from one district to another, or changing boundaries of districts, no school district shall contain less than four sections of

land, unless said district can support six months' school per year after such change of territory."

From this it appears, by necessary inference, that a new district may be formed, consisting of less than four sections if said district can support six months of school per year.

Whether or not the district can support that amount of school, is a question for the school superintendent to consider and determine in acting upon the petition. There is nothing in the petition indicating that said district could not support that amount of school. In the absence of a showing to the contrary, it must be assumed that the school superintendent and the board of county commissioners found that said district could support a school for six months during the year. This determination was final.

As to the second proposition, we feel that to uphold it would be to place upon the powers of the county school superintendent a limitation which we do not believe the legislature intended. No decision is called to our attention wherein this question has been passed upon by any court. It appears, however, that the question was heretofore submitted to the attorney general of the state and, in an opinion given thereupon, he employs the following language:

"I am of the opinion that the provisions of law are sufficiently broad to allow the school superintendent, after he has heard all the evidence presented by the parties interested, to exercise his judgment, within reasonable limits, in the organization of such new districts and the fixing of their boundaries, and that in so doing he may correct any mistakes that may have been made in the description given in the petition, and in a proper case modify the boundaries described therein." 1 Op. Atty. Gen. 197.

We think this holding is correct. If, in thus modifying the boundaries of the proposed new district, he acts unwisely or is guilty of an abuse of discretion, the statute provides for an appeal to the board of county commissioners where the error, if it be such, may be corrected; and said statute

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provides that the action of the commissioners shall be final. 3 Bal. Code, § 2275. This being the case, the court would have no jurisdiction to review the action of said board, unless there appeared to be either a want of jurisdiction, or some action in excess of jurisdiction. In this case we think the action of the board not open to either of these objections. The county school superintendent having had jurisdiction of the subject-matter, and the board of county commissioners, upon appeal, having reviewed his action and approved the same, and not having transcended the limits of its jurisdiction, we think the action of the trial court in quashing the writ was right. Said order and judgment are therefore affirmed.

MOUNT, C. J., HADLEY, DUNBAR, and CROW, JJ., concur.

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41	41

[No. 5739. Decided September 26, 1905.]

HARRY G. ROWLAND *et al.*, Respondents, v. JONAS O.
ESKELAND *et al.*, Appellants.¹

TAXATION — FORECLOSURE OF LIENS — SERVICE BY PUBLICATION — NOTICE TO OWNERS—OWNERS DESCRIBED IN CERTIFICATE. In an action of ejectment by the purchaser of lands sold on a foreclosure of an individual delinquency tax certificate, an answer of the owners claiming by adverse possession fails to state any valid ground for attack on the foreclosure judgment by alleging the fact that they were resident owners, well known to the plaintiff, and were not served with notice; since the summons and notice need only be given to the owner described in the certificate; and since the proceeding is *in rem*, and it is competent for the legislature to provide for foreclosure without service other than by publication.

SAME — FORECLOSURE JUDGMENT — CONCLUSIVENESS — COLLATERAL ATTACK. A tax foreclosure judgment is conclusive as to all defenses specified in Bal. Code, § 1767, as to parties not contesting the same, who are thereby estopped to collaterally attack the judgment on the ground specified.

¹Reported in 82 Pac. 599.

SAME—ANSWER—TENDER OF TAX PREREQUISITE TO DEFENSE. In an action by a purchaser to recover the possession of lands sold for taxes, it is a prerequisite to a defense that the defendants shall allege and prove a tender of the taxes for which the land was sold.

Appeal from the judgment of the superior court for Pierce county, Huston, J., entered March 25, 1905, upon findings in favor of the plaintiffs after a trial before the court without a jury, upon sustaining an objection to the introduction of any evidence in support of defendant's answer, in an action of ejectment. Affirmed.

John A. Parker and *J. W. A. Nichols*, for appellants.

Dix H. Rowland, for respondents.

MOUNT, C. J.—This is an action in ejectment brought by the respondents, to obtain possession of certain real estate in Pierce county. The complaint alleges title by virtue of a county treasurer's deed, issued under tax foreclosure proceedings upon a certificate of delinquency. The appellants answered the complaint, and denied generally the allegations thereof, and alleged three affirmative defenses, which, omitting the formal parts, are as follows:

"(1) That these defendants during the last past sixteen years have been and still are in the peaceable, continuous, open, notorious, and adverse possession and occupation as their homes of said premises, under claim of title and ownership thereof, and have been during all of said time citizens and residents of the said county and state, having their home and well-known abode on the said premises, and so well known to plaintiffs herein; and that no summons, notice, or process of any kind has ever been served on defendants, or either of them, for the foreclosure of any tax lien by plaintiffs, or any person, persons, or corporation, or at all.

"(2) That more than two-thirds of the premises described in the plaintiffs' complaint herein is of the class known as tide lands, lying below the high water line or lines of mesne high tide of the waters of Puget Sound, and is the property of the state of Washington, not subject to taxation for any purpose; that if any taxes have been levied

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against said property, said attempted levies, and each and every of them, have been made against the property as a whole, and said levies and all proceedings thereunder are void for all purposes.

“(3) That the foreclosure proceedings under the alleged deed referred to in plaintiffs’ complaint were irregular and void in this: The tax certificate issued therein was a single certificate issued against all of said property for taxes levied against said property as a whole; that said property is not of one single tract, but consists of two separate lots, tracts, or parcels of ground and entitled to separate assessment, levy, foreclosure, and sale for any taxes that might be properly taxable against the same, and that more than two-thirds of each of said tracts or lots so proceeded against is wholly non-taxable; that the assessment liens for the taxes attempted to be levied against said lots were sought to be foreclosed as a single lien against all of said property, and that both of said separate lots were sold together for one single sum, and were not sold or offered separately for any tax, levied or sought to be levied against them.”

Then follows the prayer, that the plaintiffs’ deed be held for naught and the action dismissed. Respondents filed a demurrer to each of these separate defenses, upon the ground that they did not state facts sufficient to constitute a defense. This demurrer was overruled, and respondents replied, denying the allegations of each of the separate answers, and alleging, by way of estoppel, that defendants had never paid or tendered to the respondents the taxes paid by them, and that the defenses alleged in the answer existed prior to the foreclosure proceedings, and should have been presented as a defense in that action.

At the trial the plaintiffs offered in evidence their tax deed, and some other evidence relating to the manner of assessment of the property, and rested their case. A witness for defendants was then called and sworn, but before he was permitted to testify, plaintiffs objected to the introduction of any evidence by defendants, on the ground that the answer failed to set out any payment or tender of the

amount of taxes for which the property was sold, or any part thereof. The court sustained this objection. Defendants then offered to prove the facts substantially in the language of their separate defenses, as above quoted. This offer was denied. No offer or request was made to amend the answer in any respect, or to prove any other facts than those stated therein. Thereupon findings and a judgment were entered by the court in favor of the plaintiffs. Defendants appeal.

Bal. Code, § 1767, provides, that deeds executed by the county treasurer upon foreclosure of certificates for delinquent taxes shall be *prima facie* evidence in all suits in relation to the right of the purchaser to the real estate conveyed; that the real estate was subject to taxation, and was listed and assessed as required by law; that the taxes were not paid; that the real estate had not been redeemed; that it was sold for taxes, as stated in the deed; that the grantee in the deed was the purchaser, and that the sale was conducted in the manner required by law. The same section also provides:

“And any judgment for the deed to real estate sold for delinquent taxes rendered after the passage of this act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessments have been paid, or the real estate was not liable to the tax or assessment.”

Under the provisions of this section, the tax deed made a *prima facie* case in favor of the respondents, and they were entitled to a judgment, unless the facts stated in the answer constituted a defense. Appellants contend that the allegation in the answer, to the effect that they had been

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for sixteen years in the open and adverse occupation and claim of said premises as a home, which facts were well known to respondents, and that appellants were not made parties to the foreclosure suit, or given any notice thereof, rendered the judgment in foreclosure void, and since appellants were not parties to that action, they are not estopped to raise objections thereto. The statute in regard to foreclosure of certificates of delinquent taxes held by individuals provides, at § 96, Revenue Law, 1897, as amended in 1899 (Laws 1899, p. 296), that:

“The holder of any certificate of delinquency may give notice to the owner of the property described in such certificate that he will apply to the superior court of the county in which such property is situated for a judgment foreclosing the lien.”

Section 97 provides that the summons shall be served in the same manner as in civil actions. See, *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786. Section 98 (Laws 1899, p. 297), provides that, when the certificates are issued to the county and foreclosed by the county, the notice may be given exclusively by publication. We held in *Spokane Falls etc. R. Co. v. Abitz*, 38 Wash. 8, 80 Pac. 192, that the notice is sufficient where it is given to the person appearing as owner on the treasurer's rolls when the certificate is issued. The statute only requires notice to be given to the owner *described in such certificate*. In *Allen v. Peterson*, 38 Wash. 599, 80 Pac. 849, we said:

“As we have repeatedly held, a tax foreclosure proceeding in this state is a proceeding against property, and is in no sense an action against the person of the owner of such property. Its purpose is to charge such property with its just proportion of the public revenues, and the state's dominion over the land exists for that purpose without regard to its ownership. When, therefore, the legislature provided that the lien for taxes might be foreclosed in the courts against the person to whom the land was assessed, whether

that person was or was not the owner of the property, it acted within its powers, and the person foreclosing acquires a legal title by a proceeding as the statute directs;"

citing, *Woodward v. Taylor*, 33 Wash. 1, 73 Pac. 785, 75 Pac. 646; *Washington Timber & Loan Co. v. Smith*, 34 Wash. 625, 76 Pac. 267; *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385; *Morrison v. Shipman*, 37 Wash. 171, 79 Pac. 632; *Spokane Falls etc. R. Co. v. Abitz*, *supra*. See, also, *Carson v. Titlow*, 38 Wash. 196, 80 Pac. 299; *Anderson v. Turati*, 39 Wash. 155, 81 Pac. 557.

It follows that the actual ownership of the property is immaterial in these foreclosure proceedings, so long as the owner described in the certificate, and to whom the property was assessed, is given notice of such proceedings. It will be noticed that the answer in this case does not allege that the person or persons described in such certificate, and to whom the property was assessed, were not given notice of the proceedings, and it is not alleged that the property was assessed to any of the appellants. While the allegation of adverse possession, etc., may be sufficient to show that the appellants were the actual owners of the lands by reason of such possession, it does not follow that the property was not assessed to the owners of the record title against whom the appellants were maintaining ownership by adverse possession. Appellants did not allege, or offer to prove, the facts necessary to show that the proper notice was not given under the statute. We must presume, therefore, because nothing appears in the record to the contrary, that the court had jurisdiction over the land in the foreclosure proceedings.

If appellants desired to contest the collection of the taxes, because of matters set out in their second and third defenses, they were required to do so in the foreclosure action. These questions cannot be tried in this collateral proceeding, under the statute above cited. The answer did not state a defense to the action, and no proof of any facts constituting

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a defense was offered. Furthermore, we have heretofore held that it was necessary for the defendants to allege and prove a tender to the plaintiffs of the taxes justly due and paid by them, as a prerequisite to their defense in this kind of a case. *Merritt v. Corey*, 22 Wash. 444, 61 Pac. 171; *Denman v. Steinbach*, 29 Wash. 179, 69 Pac. 751. The second and third defenses, in substance, admit that a part of the land was taxable. It was certainly necessary to allege that such taxes had been paid or tendered.

There is no error in the record, and the judgment is therefore affirmed.

HADLEY, CROW, FULLERTON, and DUNBAR, JJ., concur.

Root, J., concurs in the result.

[No. 5647. Decided September 27, 1905.]

JOSEPH ROHRER, *Respondent*, v. GEORGE ROHRER,
Appellant.¹

TRUSTS—CONTRACTS—CONSTRUCTION. A written agreement by a grantee to account for the "net profits" of the real estate conveyed to his brothers and sisters, upon a "future distribution of heirship," will be held to mean the entire proceeds, and not the proceeds less the expense of the grantee's education in Europe, as claimed by him, where there was evidence to sustain a verdict to the effect that such was the intent of the parties.

ACCOUNTING—CONVERSION—PROCEEDS OF TRUST—REFUSAL TO ACCOUNT. The grantee of a deed who received the same in trust and promised to account for the proceeds to his brothers and sisters upon a "future distribution of heirship," cannot, after selling the land, and the death of his mother, avoid an accounting by asserting the invalidity of the deed made by him upon selling the property; and his refusal to account to the executor of the estate constitutes a conversion.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered December 29, 1904, upon

¹Reported in 82 Pac. 289.

the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for a conversion. Affirmed.

Munter & Jesseph, for appellant.

A. H. Kenyon and *H. M. Stephens*, for respondent.

Root, J.—Respondent, Joseph Rohrer, and his wife, Regina Rohrer, some years ago purchased, with community funds, certain real estate, in Switzerland, known as the "Seehof." Subsequently, and during the life of Regina Rohrer, said Joseph Rohrer executed and delivered to his son, appellant, George Rohrer, a warranty deed to said premises. Prior to the commencement of this action, said Regina Rohrer died, testate, respondent being designated and appointed as executor of her will. Respondent claims that said property was conveyed to appellant solely for the purpose of enabling the latter to sell the same for the use and benefit of respondent and wife. Appellant insists that the conveyance was for the purpose of enabling him to finish his studies in Europe. In connection with the transaction, appellant signed a certain instrument, of which the record furnishes us with two translations; one by appellant, as follows:

"The undersigned hereby promises to bring into account to his father or to his brothers or sisters at the eventual future distribution of heirship the net profits, which he will realize from the 'Seehof.'

"Sarnen, July 29, 1898. (Signed) George Rohrer."

The other translation, by respondent, is as follows:

"The subscriber promises herewith, when there will be a dealing of heritance to give in account what he will win from the Seehof to his father or to his brothers and sisters."

Subsequently appellant sold the property for \$2,685, partly cash, and part in notes secured by mortgage. He neglected and refused to account to respondent, either in his individual capacity or as executor of Mrs. Rohrer's estate, for said proceeds or any part thereof. This action was brought, al-

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leging a conversion, and seeking to recover the full amount of the consideration for which appellant sold said property. A verdict was returned for the full amount, in favor of respondent, and judgment entered thereupon. From said judgment this appeal is taken.

The principal question of fact was as to the purpose of the conveyance by respondent to appellant. Upon the evidence adduced, the jury decided this issue favorably to respondent. There is ample evidence to sustain the verdict in this particular.

The main part of appellant's argument is in support of the contention that the deed, executed by respondent to appellant, was void, as one spouse cannot convey community real estate without the other joining in the conveyance. Appellant argues that, in the absence of proof to the contrary, the law of Switzerland must be presumed to be the same as our own regarding the requisites to a legal transfer. Respondent answers that a contract made in a foreign state or country is presumed to have been made in accordance with the law of that country, in the absence of a showing to the contrary.

As to which of these presumptions should control in this case, we do not feel called upon to decide. The fact is admitted that a deed was made by respondent to appellant. By virtue thereof, he sold the property thereafter to somebody else, and received money and notes therefor. He did not account for these proceeds. His refusal to account for same constituted a conversion thereof. He argues that his grantee might come against him to recover the money paid, because of not receiving good title. We do not think appellant's answer herein supports such a defense, and do not think it would be efficacious, if presented. Respondent, as an individual and as executor, having prosecuted this action, would be estopped to question the validity of the deed. It would seem that appellant, having made a deed himself to the premises, whereby he sold them, would be estopped to

assert the illegality and insufficiency of these deeds—at least, prior to any objection being made by his grantee.

It is urged that appellant was not required to account until some future time. While the translations are somewhat conflicting and indefinite, yet we think it may be fairly held to have been a promise to account as soon as the proceeds were received, or at least as soon as any disposition should be undertaken of the estate of respondent or his wife. Her estate was in process of administration when this suit was instituted, and her executor is a party plaintiff herein. Several errors are alleged in the matter of admitting and excluding evidence, but we find none of a prejudicial character.

The jury having decided the questions of fact adversely to appellant, and no errors appearing in the rulings of the trial judge, the judgment appealed from is affirmed.

MOUNT, C. J., CROW, HADLEY, and DUNBAR, JJ., concur.

FULLERTON, J., took no part.

[No. 5531. Decided September 26, 1905.]

ALMIRA L. SMITH *et al.*, Respondents, v. CHARLES GLENN
et al., Appellants.¹

APPEAL AND ERROR—TRANSCRIPT—INDEX—SUFFICIENCY. A statement of facts will not be struck out for failure of the appellant to index the same where an index has been prepared by the clerk of the supreme court.

SAME—STATEMENT OF FACTS—ELIMINATION OF EVIDENCE IMMATERIAL TO ISSUES ON APPEAL. It is proper to eliminate from the statement of facts all evidence except such as is material to the issue triable in the supreme court.

SAME—REVIEW—NECESSITY OF EXCEPTIONS TO FINDINGS OF FACT—REVIEW OF ERRORS ON RECEPTION OF EVIDENCE. A general exception to findings of facts is insufficient to secure a review of the evidence, but the statement will be retained to review errors upon the admission of evidence.

¹Reported in 82 Pac. 605.

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SAME—EVIDENCE—HARMLESS ERROR NOT AFFECTING CONCEDED FINDINGS. Upon a trial before the court without a jury it is harmless error to exclude testimony which was not susceptible of influencing the findings.

SAME—ERROR ON REFUSING NEW TRIAL—OBJECTIONS CONTROLLED BY CONCEDED FINDINGS. Where the exceptions to findings are insufficient, a ruling upon a motion for a new trial for insufficiency of the evidence must be controlled by the findings of fact.

VENDOR AND PURCHASER—RESCISSION BY VENDEE—GROUNDS FOR—FAILURE OF TITLE—BARGAIN FOR IMMEDIATE POSSESSION. Where a contract for the sale of a farm called for immediate delivery of possession of the premises in the month of August, which was desired by the vendees in order to make improvements and put in fall crops, there was a failure of consideration entitling the vendees to a rescission, when it appears that the vendors had no title or right of possession, and did not acquire the same until November, after the vendees had commenced the action for a rescission.

Appeal from a judgment of the superior for Spokane county, Kennan, J., entered July 30, 1904, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to rescind a contract for the purchase of lands. *Affirmed.*

Gallagher & Thayer, for appellants.

Barnes & Latimer, for respondents.

Root, J.—Respondents instituted this action to rescind a contract for the purchase of certain farming lands from appellants, and to recover \$500 paid on account of said contract. From a judgment in favor of respondents, this appeal is prosecuted. Appellants appear in this court by different counsel than represented them in the trial court.

Respondents move to strike the statement of facts upon two grounds: (1) Because said statement is not indexed; (2) because said statement does not contain all of the evidence. The index to the statement has been prepared by the clerk of this court and attached at the request of appellants' attorneys. This disposes of the first objection. The certificate of the trial judge recites that the statement of facts

includes all of the material evidence "except that there is omitted from said statement of facts all evidence which refers solely to the kind, quality, physical condition, fertility, productivity, salability, and value of the lands and premises mentioned in the pleadings in this cause." The evidence thus excluded had to do with an issue of fact upon which the trial court found in favor of appellants. Said issue is in no manner involved in the case as it comes before us on appeal. Hence, it was not necessary to bring up said evidence. The practice of eliminating all evidence except such as is material to the issues triable in this court is to be commended. The motion to strike the statement is denied.

It is further maintained, however, by respondent that this court cannot consider said statement for the reason that no legal exceptions were reserved to the findings. The only exceptions taken appear at the end of the findings in the following language:

"To each of which findings proposed by the defendants and given by the court, duly excepted to on the part of the plaintiffs; and to each of the findings proposed by the plaintiffs and given by the court were duly excepted to by the defendants, and the exceptions of the parties aforesaid are hereby allowed."

Under numerous decisions of this court, these exceptions are insufficient. *Hannegan v. Roth*, 12 Wash. 65, 40 Pac. 636; *Peters v. Lewis*, 33 Wash. 617, 74 Pac. 815. It has, however, been the holding of the court, in cases of defective exceptions, or in the absence of any exceptions to the findings of fact, that it would examine any ruling of the trial court in excluding evidence where proper exception had been reserved to said ruling. *Schlotfeldt v. Bull*, 17 Wash. 6, 48 Pac. 343; *Lilly v. Eklund*, 37 Wash. 532, 79 Pac. 1107; *Bringgold v. Bringgold*, ante p. 121, 82 Pac. 179.

Error is assigned herein upon the action of the trial court in excluding certain evidence offered by appellants. Respondent Almira L. Smith, being upon the witness stand,

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was asked, upon cross-examination by appellants' counsel, this question: "Did they offer to give you the privilege of going on there and putting in the crop?" and the following question: "I will ask if they did not offer to place you in possession of that piece of property?" Both questions were objected to, "for the reason that it is not shown that they had the right to give the privilege, and that it is a matter of defense." Said objection was sustained. This question was also asked: "Isn't it a fact that, when you purchased this piece of ground from these defendants, that you didn't do it upon the representations indicated in that last subdivision of paragraph five of that complaint?" This was objected to as improper in form, not tending to prove any issue, incompetent, irrelevant, and immaterial. The question referred to an allegation to the effect that appellants represented themselves as having, and being able to convey, good title. The objection was sustained by the court. In view of the undisputed evidence and facts in the case, and the unquestioned findings not susceptible of influence by the admission of said excluded testimony, we are unable to perceive how answers (either in the affirmative or negative) to these questions could have produced different findings, or wrought in any manner a contrary result. Hence appellants were not prejudiced by the court's action in excluding answers to said questions, even if erroneous, which we do not find it to have been.

The refusal of the court to grant appellants a new trial is assigned as error. It does not appear to be argued except inferentially. It is claimed that the judgment should be reversed:

"Because (a) no breach of the contract is shown, (b) because a covenant for quiet enjoyment is broken only by eviction, (c) respondents first violated the contract by not giving appellants opportunity to meet the objections to the title, (d) respondents had no right to demand title before offering to make final payment, or before September 23, 1903,

the date when such payment became due, (e) respondents received all they contracted for, i. e. the right to take possession which they refused."

In considering these contentions, we must be controlled by the unquestioned findings of fact, which are against appellants.

The contract was executed August 19, 1903. By its terms, appellants were to give respondents "full possession" that day. At that time appellants did not have title to the property, and are not shown by the findings to have had any legal right or authority to give respondents possession. The abstract also showed a flaw in the title of those from whom appellants expected to derive title. Respondents desired immediate possession, in order to build a house and make other improvements on the farm, and put in the fall crops. The title to said premises had not been acquired and perfected by appellants at the time this action was commenced, September 24, 1903, and not until November 6, 1903, did they secure said title. Having bargained for immediate legal and rightful possession, as a material element of the consideration, respondents, upon learning of appellants' inability to furnish such, were justified in treating the contract as broken. That appellants granted them permission to take possession, or offered them possession, was not, in itself, a compliance with the terms of the contract. If appellants did not have the right to give such possession, respondents would have been trespassers to have gone upon the premises. The findings show that appellants had no title, and fail to show any right in them to give respondents possession. It clearly appearing that immediate or early possession was of the essence of the contract, we think there was a failure of consideration justifying rescission.

So far as the motion for a new trial is based upon the statement of facts as a whole, we cannot consider it. So far as it is based upon the exclusion of evidence and upon

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the unquestioned findings of fact, we find no error in the trial court's action. The only other question is as to the sufficiency of the findings of fact to sustain the judgment and decree. In the light of the admitted facts in the pleadings, we think the findings sustain the judgment and decree. The same is therefore affirmed.

MOUNT, C. J., DUNBAR, CROW, and HADLEY, JJ., concur.
FULLERTON, J., took no part.

[No. 5645. Decided September 28, 1905.]

DELL STUART, *Appellant*, v. PIERCE COUNTY, *Respondent*.¹

ESTOPPEL—STALE CLAIM—LACHES IN ASSERTING UNRECORDED RIGHT TO PURCHASE-MONEY LIEN—KNOWLEDGE OF SUIT AND ACQUIESCENCE IN JUDGMENT—BONA FIDES OF CLAIM—EVIDENCE—SUFFICIENCY. The owner of an undisclosed title to a claim for a purchase-money lien upon real estate, is guilty of laches, which will bar a recovery as upon a stale claim, where he had knowledge of expensive litigation by the county against the apparent owners of record, in which it was adjudged that the land had escheated to the county, and asserted no claim, during the pendency of the suit, or for more than five years after the suit was commenced, especially where there was evidence showing that the claim for a lien was not *bona fide*.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered December 27, 1904, upon findings in favor of the defendant, after a trial before the court without a jury, dismissing on the merits an action to foreclose a purchase-money lien upon real estate. Affirmed.

John C. Stallcup and *J. W. A. Nichols*, for appellant.

Charles O. Bates and *B. F. Jacobs*, for respondent.

DUNBAR, J.—This was an equitable cause, brought by the appellant for the foreclosure of an alleged purchase-money mortgage lien upon a four-acre tract of land in the

¹Reported in 82 Pac. 270.

city of Tacoma. It is alleged that, on the 8th day of August, 1891, one Anna Van Ogle and her husband, then being seized in fee of the interest, right, and estate which one George Washington had held in certain described premises, conveyed the same to Seymour R. Allen, and that the grantors reserved a lien on the property conveyed for the payment of the purchase price of \$15,000; that Allen subsequently died, seized of the said tract of land, subject to the said lien for \$15,000; and that, by deed of conveyance and assignments, the plaintiff is now, and for the last past nine years has been, the holder and owner of the said indebtedness and lien of \$15,000 against said premises; that no part of the same has been paid except certain small sums aggregating \$100; alleged that the county of Pierce claims right and title to said four-acre tract of land; and prayed for judgment and decree of foreclosure, and that the county's claim of right be held for naught. The county of Pierce denied the principal allegations of the complaint; alleged that the statute of limitations had run upon appellant's claim, if it ever existed; that, in a certain action, No. 16,610, in Pierce county, Washington, in the year 1897, it was decreed that the said tract of land was the property of Pierce county. Upon the trial of the cause, judgment was entered in favor of the respondent Pierce county.

It was admitted upon the trial, and is asserted in the briefs, that the original source of title, so far as these litigants are concerned, was in one George Washington. The court found that, in September, 1871, George Washington executed his power of attorney to one Mathews, empowering the said Mathews to make conveyance for him, and in his name, of the above described lands; that thereafter the said George Washington, by his said attorney Mathews, conveyed the above described lands to one George Luviney, which conveyance bears date the 24th day of March, 1873. It may be stated parenthetically that Luviney afterwards died, intestate and without heirs, and that the land escheated eventually to

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the county of Pierce; at least, that was the decree of the court of which we have spoken.

It was also found that, at the time of the said action No. 16,610, the apparent owners of record of the lien, by plaintiff sought to be foreclosed in this action, were Frank B. Weistling and Anna E. Weistling, his wife, both of whom were personally served with due process in said cause, and defaulted therein; that the plaintiff herein, Dell Stuart, was not a party to said cause, but knew of the same, was fully advised of its nature and object, and of the judgment rendered in said cause, and did not disclose that he was then the owner of any interest whatever in the lands involved in that action; that he has offered no excuse, reason, or explanation why, if at the time said action was begun by said county of Pierce he was the owner of the lien in this action sought to be foreclosed, he did not disclose said ownership at said time, and protect his rights and interest in said cause, if any such he had; that upon the trial of this cause, there was no evidence introduced by the plaintiff or the defendant that in any way impeached or questioned the regularity or validity of the power of attorney from Washington to Mathews, and the deed from Washington, by said attorney, to Luvinney; that Anna Van Ogle, at the time said conveyance from Washington to her was executed, the conveyance being one upon which the appellant in this case bases his right of action, did not understand that she was buying the particular tract of land herein described; that at said time Washington did not claim to her to be the owner of said tract; that, when conveyance of said tract of land was made by her to said Seymour R. Allen, and the lien reserved to her in the body of said deed, there was no consideration whatever therefor, and that no such lien in fact existed, and that no such lien was reserved to her; that, when said pretended lien was, by her and her husband, assigned to Frank B. Weistling, there was no consideration whatever for said assignment;

that, when said pretended lien was assigned to Weistling, and from Weistling to Gustin, there was no consideration whatever for said pretended assignment; that, when said pretended lien was assigned from Gustin to Dell Stuart, there was no consideration whatever for said assignment; that there were no *bona fides* in said lien at any time; and that Dell Stuart, the plaintiff herein, was the party who, as attorney, caused this lien to be reserved in said first deed, and these various assignments of the same from Mrs. Van Ogle through Weistling, Gustin, and back to himself, and knew all the time that no such lien in fact existed, and that there was no consideration for the lien itself, or any of the said pretended assignments, and was the attorney who caused the same to be made.

The court also found that there was no satisfactory evidence of any payments upon any lien which would save it from the operation of the statute of limitations; that the owners of record of said lien, at the time said action was begun by Pierce county against Van Ogle, Gustin and others, in the superior court, on the 4th day of December, 1897, were parties to said action and bound thereby; and that plaintiff, Dell Stuart, is bound by said action, for the reason that, if any such lien existed and had been assigned to him, he was the owner of an unrecorded title thereto, which instrument of title was recorded subsequently to the 29th day of March, 1898, the date when said plaintiff in said action of Pierce county filed its notice of *lis pendens*, giving notice of the pendency of the action involving the title of said county to the land herein described; and that the appellant was furnished with a copy of the complaint in said cause, and knew that the owners of record of the lien he is now seeking to foreclose were parties to said cause, and asserted no right to said lien upon the same; knew of the judgment rendered in said cause, and made no motion to vacate, modify, or set aside the same, and

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did not appeal therefrom; has stood by and suffered the same to be made without protest, and has allowed a period of nearly five years to intervene without any reason shown therefor, before questioning the same in any manner, and then not in a direct proceeding to vacate or modify the same, but in a collateral way; and has been guilty of laches in neglecting and failing to assert his rights to the lien in question, if any such rights he ever had, and ought not to be heard to do so in this action. The conclusions of law followed correctly the facts found by the court, wherein it was held that the plaintiff in this action was estopped from bringing the action, and the title of the defendant Pierce county to the lands described in the plaintiff's complaint was held to be good and valid.

The record in this case is somewhat voluminous, but we are satisfied from an examination of it that the findings of the court were fully justified. That being true, there seem to be no law propositions upon which a discussion would be pertinent. Courts of equity do not look with favor upon the prosecution of stale claims. In this cause, the plaintiff, with an undisclosed title, assuming that the lien ever existed in reality, stood by with knowledge of the prosecution of an expensive litigation on the part of the county, and those who, he claims, had assigned to him this lien, saw the litigation proceed to judgment, made no effort to vacate the judgment, and now brings this action, after nearly five years from the rendition of the same. We are not aware of any law which would sustain him in such a proceeding, and think, with the court, that he should now be estopped, in all good conscience, from prosecuting this claim. We are also of the opinion, from the record, that there never was any *bona fide* lien in existence, and that the Van Ogles, from whom appellant claims title, never understood that they had claim of title or right to this land, or any lien thereon, and that the true condition of the claim was shown

to, and understood by, the appellant, at the time that he alleges he purchased such alleged claim.

Upon the whole record, the judgment is affirmed.

MOUNT, C. J., CROW, HADLEY, ROOT, and FULLERTON, JJ., concur.

[No. 5643. Decided September 28, 1905.]

ALEX R. WINSTONE, *Appellant*, v. JOSEPHINA WINSTONE,
Respondent.¹

JUDGMENTS — ACTION IN EQUITY TO SET ASIDE — GROUNDS. An action to vacate a judgment will not be entertained on the ground of the neglect of the attorney in failing to notify the client of the date of the trial, when it does not appear beyond a reasonable doubt that the trial court abused its discretion in refusing to vacate the judgment and grant a new trial.

SAME—DECREE OF DIVORCE—VACATION. A decree of divorce will not be vacated except for the specific causes provided by law, proved and found by a court of undoubted jurisdiction over the subject-matter and the parties.

NEW TRIAL—DENIAL—FAILURE TO APPEAL FROM ORDER—ESTOPPEL IN SUBSEQUENT PROCEEDING. Where a motion for a new trial on the ground of the neglect of the attorney was presented by new attorneys, and denied, and no appeal was taken, it is proper to dismiss an action to vacate the judgment, based on the same grounds presented in the motion for a new trial.

Appeal from a judgment of the superior court for Kitsap county, Denney, J., entered January 12, 1905, dismissing an action in equity to vacate a judgment, upon sustaining a demurrer to the complaint. Affirmed.

Sweeney & Steiner, for appellant.

Hastings & Stedman and *W. H. Beatty*, for respondent.

DUNBAR, J.—This is an action in equity, praying for the vacation of a judgment granting a decree of divorce to re-

¹Reported in 82 Pac. 268.

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spondent. The complaint alleges, in substance, that shortly after the institution of the divorce suit by his wife, the respondent in this action, he came to the city of Seattle and employed, as his attorney to represent him in said action, one Fred H. Peterson; that between the 1st and 10th days of November, he was informed by his attorney Peterson that the issues in the said cause were made up, and that said suit for divorce would be set down for trial and tried on the 4th day of December, 1903, further stating that when the case was set down for trial he, the said Fred H. Peterson, would notify the plaintiff and instruct him to have his witnesses ready to appear at said trial; that, on or about the 3d day of December, 1903, the plaintiff was informed by a friend that a divorce had been granted to the respondent herein, and that plaintiff immediately came to the city of Seattle, called upon his said attorney, and demanded an explanation, the said attorney never having advised him of the setting of said case for trial, or that said case would be tried upon the 2d day of December; whereupon Peterson informed him that he would at once make a motion for a new trial, and would have said decree set aside and a new trial granted, which motion was prepared, with the necessary affidavits attached; that, in the latter part of December, he was informed that no motion for a new trial had ever been filed; that plaintiff then sought the advice of other counsel, and, upon Mr. Peterson's signing a written withdrawal from said case, engaged other counsel to represent him, and to obtain, if possible, a new trial in said cause; that plaintiff then filed a motion for new trial in said cause, and, in support of said motion, filed his affidavit, along with the affidavits of many others, a copy of the affidavit being made a part of the complaint in this case. The motion for new trial was overruled, and no appeal was taken therefrom. The complaint states what are alleged to be the merits of the defense to the action.

This is the substance of the complaint, to which a demurrer was interposed, which demurrer was sustained by the court.

The judgment or decree which is sought to be vacated was made upon the 2d day of December, 1903, and the complaint and summons in this action were filed on the 2d day of June, 1904. When the same were served, it does not appear. It will be observed that there is no allegation of fraud or collusion between the respondent in this cause and the appellant's attorney, but the allegation is simply one of neglect on the part of the attorney. As a general rule, the act or omission of the attorney is the act or omission of the client. No negligence will be excusable in the former which would not be excusable in the latter. Black, Judgments, § 341. In many jurisdictions courts have refused, under any circumstances, to set aside a judgment on the sole ground of neglect or carelessness of an attorney; but while we are not prepared to announce so broad a doctrine, because circumstances might be presented of negligence on the part of an attorney from the effects of which a court of equity, through its inherent power, would relieve litigants — yet such questions must, of necessity, be so largely within the knowledge and discretion of the trial court, who is acquainted with all the circumstances of the case, that it must appear beyond a reasonable doubt to the appellate court that such discretion has been abused before the judgment of the trial court will be set aside.

In addition to this, this action is for the purpose of vacating a judgment in a divorce case, and it is uniformly held that judgments in divorce cases will not be readily set aside, especially in jurisdictions where parties to the divorce action are permitted to marry again. The reason assigned for the reluctance of courts to grant the vacation of judgments, in such cases, is so plainly and forcibly presented in *Metler v. Metler*, 32 Wash. 494, 73 Pac. 535, that we cannot do better than to reproduce it here. In discussing

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the discrimination made against the vacation of a judgment in divorce cases under Bal. Code, § 4880, the court said:

"The reasons for making this distinction between judgments in this particular action and judgments in ordinary actions are apparent. A decree of divorce affects the status of the parties, both with respect to their relations to one another and their relations to the public. By the terms of the statute, divorced persons may lawfully marry after a limited time from the rendition of the decree, and to permit its vacation is to make it possible, under the guise of law, to inflict injury and suffering upon persons whose innocence entitles them to every protection the law can afford. It is therefore highly important, not only for the sake of the parties thereto, but also for the sake of such persons, that decrees of divorce should not be granted except for specific causes provided by law, proved and found by the court, in actions where the court has undoubted jurisdiction over the subject-matter and the parties; but it is also equally important that the decree, when once granted, be not disturbed by the court granting it."

Although the section discussed is not involved in this proceeding, the reasons given by the court for not disturbing a decree of divorce are equally applicable.

Again, a motion for a new trial was heard by the court by new attorneys employed by the appellant, upon the same affidavits that are presented in this application as a basis for the vacation of the judgment. No appeal was taken from the action of the court in overruling the motion for a new trial, and while it is said by the appellant that the evidence taken at the original trial was not recorded, and that he was unable to obtain a transcript of the same, the affidavit and proof on motion for a new trial were, or could have been preserved, and would have served the appellant on the refusal of the court to grant a new trial, and this court could have passed upon the question of whether the court erred in refusing to grant appellant a new trial upon the evidence shown by the affidavits filed for and against said motion. There having been no appeal from said order

of the court, this court is not inclined to disturb the judgment originally rendered by the trial court.

The judgment is therefore affirmed.

MOUNT, C. J., HADLEY, CROW, and FULLERTON, JJ., concur.

[No. 4628. Decided September 28, 1905.]

ISAAC A. DOSSETT, *Respondent*, v. ST. PAUL & TACOMA LUMBER COMPANY, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE—VICE PRINCIPAL AND FELLOW SERVANTS—SAWYER IN CONTROL OF CREW—SAFE PLACE—DUTY TO WARN OF DANGER RENDERING PLACE UNSAFE. A sawyer in control of a saw crew is a vice principal with reference to the duty to warn one of his crew, a log deck man, as to the danger arising from the operation of the machinery, where it appears that the log deck man was in plain view of the sawyer near a nigger slot with no means of knowing that the place was about to be rendered dangerous by the operation of the nigger, a powerful machine operated by steam for the purpose of pushing heavy logs on to the saw carriage; as it is an imperative duty of the master in furnishing a safe place to give warning of the act of a superior servant in control of machinery which would injure an inferior servant without opportunity on his part of self protection or escape.

. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The question of the contributory negligence of a servant, employed as a log deck man in a mill, and injured by the act of the sawyer in putting the machinery in operation while he was in a dangerous position, near or about to reach over a nigger slot in the discharge of his duties, is for the jury, where the evidence was conflicting as to whether he was at the time necessarily in such a position in the proper discharge of his duties.

SAME—CONTRIBUTORY NEGLIGENCE—TWO METHODS OF DOING WORK—SAFE PLACE—RENDERED UNSAFE BY ACT OF VICE PRINCIPAL. A servant cannot be said to be guilty of contributory negligence as a matter of law in electing to place himself over a nigger slot in a log deck in a sawmill, when he might have gone around the slot, where it was safe to place himself over the slot when the nigger was not in operation, and the place would become unsafe only by the action of the sawyer in operating the machinery.

¹Reported in 82 Pac. 273.

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Citations of Counsel.

SAME—INCOMPETENCY OF FELLOW SERVANT—EVIDENCE OF NEGLIGENCE ON PRIOR OCCASION—ADMISSIBILITY. In an action for personal injuries sustained through the negligence of a coservant alleged to be a vice principal, and habitually negligent and careless, evidence is admissible of a specific act of incompetence upon the part of such coservant, at which time he had injured one of his men and which was generally discussed about the mill, and also that he was cross and irritable toward the men under him.

APPEAL—REVIEW—HARMLESS ERROR. Error in refusing to strike out evidence of other acts of negligence on the part of a coservant alleged to be incompetent, is harmless where the court fully and fairly instructed the jury as to what questions of negligence they might consider, and the question of the incompetence of such coservant was not one of them.

SAME—EVIDENCE—EXPERT WITNESS—DUTIES OF SAWYERS—CUSTOM IN OTHER MILLS—ADMISSIBILITY. In an action for personal injuries sustained by an employee upon a log deck of a mill, through the act of the sawyer in operating the machinery while the plaintiff was reaching over the nigger slot, it is admissible for expert sawyers to testify as to the duty of the sawyer under such circumstances, and to state the custom and rules adopted in other mills of the same kind and capacity.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 22, 1902, upon the verdict of a jury rendered in favor of the plaintiff for \$7,500 for personal injuries sustained by a log deck man employed in defendant's mill. Affirmed.

Reynolds & Griggs and *Stiles & Doolittle*, for appellant, contended, among other things, that the employee is bound to keep a lookout for himself and guard against manifest dangers. *Morgan v. Carbon Hill Coal Co.*, 6 Wash. 577, 34 Pac. 152, 722; *Jennings v. Tacoma R. etc. Co.*, 7 Wash. 275, 34 Pac. 937; *Schulz v. Johnson*, 7 Wash. 403, 35 Pac. 130; *Cooney v. Great Northern R. Co.*, 9 Wash. 292, 37 Pac. 438; *Olson v. McMurray Cedar Lum. Co.*, 9 Wash. 500, 37 Pac. 679; *Pugh v. Oregon Imp. Co.*, 14 Wash. 331, 44 Pac. 547, 689; *Anderson v. Inland Tel. etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; *French v. First Ave. R. Co.*, 24 Wash. 83, 63 Pac. 1108. Under the circumstances, there

was no duty to warn, as that would make the master an insurer. *Mikolajczak v. North American Chem. Co.*, 129 Mich. 80, 88 N. W. 75; *Johnson v. Portland Stone Co.*, 40 Ore. 436, 67 Pac. 1013, 68 Pac. 425; *Siddall v. Pacific Mills*, 162 Mass. 378, 38 N. E. 969; Bailey, Personal Injuries, § 2706. The master is not liable for the negligent use, or for the failure to use, the appliances furnished, no matter what may be the grade of the employee whose business it is to use them. *Baltimore etc. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Central etc. R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994; *Northern Pac. R. Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; *Alaska etc. Min. Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390; *Weeks v. Scharer*, 49 C. C. A. 372, 111 Fed. 330; *Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659; *Kelly v. New Haven Steamboat Co.*, 74 Conn. 343, 50 Atl. 871, 92 Am. St. 220, 57 L. R. A. 494; *Knutter v. New York etc. Tel. Co.*, 67 N. J. L. 646, 52 Atl. 565; *Milhench v. Jenckes Mfg. Co.*, 24 R. I. 131, 52 Atl. 687; *Lepan v. Hall*, 128 Mich. 523, 87 N. W. 619; *Hawk v. McLeod Lum. Co.*, 166 Mo. 121, 65 S. W. 1022. Upon the issue as to the competency of the sawyer, a single instance of negligence could not support a charge of habitual negligence, which must be established where there is no evidence of the master's knowledge. *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510; *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176, 9 N. W. 243; *Peaslee v. Fitchburg R. Co.*, 152 Mass. 155, 25 N. E. 71; *Baulec v. New York etc. R. Co.*, 59 N. Y. 356; *Mayor etc. v. War*, 77 Md. 593, 27 Atl. 85; *Lee v. Detroit Bridge etc. Works*, 62 Mo. 565; *Baltimore Elev. Co. v. Neal*, 65 Md. 438, 5 Atl. 338; *Holland v. Southern Pac. R. Co.*, 100 Cal. 240, 34 Pac. 666; Wharton, Negligence, § 238; Bailey, Personal Injuries, §§ 1505-1525. Where there are two ways of doing a duty, the

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one safe, and the other fraught with danger, if the servant voluntarily elects the dangerous way and gets hurt, he cannot recover. *Watts v. Hart*, 7 Wash. 178, 34 Pac. 423, 771; *Jennings v. Tacoma R. etc. Co.*, 7 Wash. 275, 34 Pac. 937; *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Malmstrom v. Northern Pac. R. Co.*, 20 Wash. 195, 55 Pac. 38; *Reynolds v. Northern Pac. R. Co.*, 22 Wash. 165, 60 Pac. 120; *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981. Where the danger is not known to the master, and in reason could not have been known, or reasonably anticipated, and where it arises suddenly and unexpectedly in the performance of details of the work, there is no duty on the part of the master to give warning. *Week v. Fremont Mill Co.*, 3 Wash. 629, 29 Pac. 215; *Hogele v. Wilson*, 5 Wash. 160, 31 Pac. 469; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713; *Olson v. McMurray Cedar Lum. Co.*, 9 Wash. 500, 37 Pac. 679; *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202. The liability of the master does not depend upon the grade or rank of the employee whose negligence, if any, caused the injury, but is to be determined by the character of the act from which the injury arises. *Crispin v. Babbitt*, 81 N. Y. 516; *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830; *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334; *Hammarberg v. St. Paul etc. Lum. Co.*, 19 Wash. 537, 53 Pac. 727; *Rush v. Spokane Falls etc. R. Co.*, 23 Wash. 501, 63 Pac. 500; *Shannon v. Consolidated etc. Min. Co.*, 24 Wash. 119, 64 Pac. 169; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896; *Czarecki v. Seattle etc. Nav. Co.*, 30 Wash. 288, 70 Pac. 750.

Ellis & Fletcher, for respondent, in addition to many of the cases cited by counsel in the case of *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114, cited, *inter alia*, *Shannon v. Consolidated etc. Min. Co.*, 24 Wash. 119, 64 Pac. 169; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896; *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398; *Arm-*

strong v. Oregon Short Line etc. R. Co., 8 Utah 420, 32 Pac. 693; *Burlington etc. R. Co. v. Crockett*, 19 Neb. 138, 26 N. W. 921; *Anderson v. Northern Mill Co.*, 42 Minn. 424, 44 N. W. 315; *Erickson v. St. Paul etc. R. Co.*, 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786; *San Antonio etc. R. Co. v. McDonald* (Tex. Civ. App.), 31 S. W. 72; *Hannibal etc. R. Co. v. Fox*, 31 Kan. 586, 3 Pac. 320; *Union Pac. R. Co. v. Geary*, 52 Kan. 308, 34 Pac. 887; *Davis v. New York etc. R. Co.*, 159 Mass. 532, 34 N. E. 1070; *Promer v. Milwaukee etc. R. Co.*, 90 Wis. 215, 63 N. W. 90, 48 Am. St. 905; *Schroder v. Chicago etc. R. Co.* 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827; *Norton Bros. v. Nadebok*, 190 Ill. 595, 60 N. E. 843, 54 L. R. A. 842; *Shumway v. Walworth etc. Mfg. Co.*, 98 Mich. 411, 57 N. W. 251; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713; *Bailey v. Cascade Timber Co.*, 32 Wash. 319, 73 Pac. 385; *Grout v. Tacoma Eastern R. Co.*, 33 Wash. 524, 74 Pac. 665; *Gaudie v. Northern Lum. Co.*, 34 Wash. 34, 74 Pac. 1009; *Morrison v. Northern Pac. R. Co.*, 34 Wash. 70, 74 Pac. 1064; *Bailey v. Cascade Timber Co.*, 35 Wash. 295, 77 Pac. 377; *Jancko v. West Coast Mfg. etc. Co.*, 34 Wash. 556, 76 Pac. 78; *Flanders v. Chicago etc. R. Co.*, 51 Minn. 193, 53 N. W. 544; *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550, 80 Pac. 814; *Sandquist v. Independent Tel. Co.*, 38 Wash. 313, 80 Pac. 539; *Evans v. Louisiana Lumber Co.*, 111 La. 534, 35 South. 736; *Hendricks v. Lesure Lumber Co.*, 92 Minn. 318, 99 N. W. 1125, 100 N. W. 638.

MOUNT, C. J.—Respondent brought this action against the appellant to recover for personal injuries. The cause was tried to the court and a jury, which returned a verdict in favor of the plaintiff for \$7,500. The defendant appeals from a judgment on the verdict.

At the trial there was very little dispute upon the facts in the case, which are substantially as follows: The appellant owns and operates a lumber manufacturing plant, in Ta-

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coma, at which plant a large number of men are employed. These men were divided into gangs of men at the several departments of the work. Moses La Faw was foreman of the mill, and hired and discharged all employees. There was a superintendent over Mr. La Faw. At what is called the head of the mill were two large band saws, where the logs from the mill pond were received, and from which the lumber as cut passed through various operations in the mill until it was finally carried out into the yards. Each of the gangs of men had one principal man who had charge of the men in the gang, and who gave working directions when necessary. Usually each man knew his duties after his first instructions, and performed them without special direction.

At what was called the "short side" of the saw mill, James McAnally had charge of a gang of five men, whose duties were to operate one of the saws and cut logs into lumber. Mr. McAnally was the "head sawyer," known as such by reason of the fact that the logs first came to his saw. His duties were to operate the saw and machinery necessary to pass the logs into the saw, and also to direct the men working with him. These men were under his direction and control, and bound to obey his orders. They were hired and discharged upon his request, by the foreman, Mr. La Faw.

The respondent, Dossett, was one of the gang of men under Mr. McAnally, and was known as the "log deck man." The log deck was about eighteen feet wide, and about fifty feet long, north and south. On the east side of the log deck, were the rolls upon which logs came up into the mill from the mill pond. The saw carriage was to the west of the log deck, which was slightly inclined from the rolls, on the east, to the saw carriage, on the west. This saw carriage was operated back and forth, northerly and southerly, at the will of the sawyer. On the saw carriage were two, and sometimes three, men who stood behind the

log and set iron dogs into the log, so as to hold it steady on the carriage, and so as to change its position from time to time as required. The sawyer operated the saw carriage by means of a lever, at the northwest corner of the log deck, close to the saw. Immediately over the saw carriage were two friction rollers, one of which was operated by an overhead lever, just behind the sawyer at the north end of the log deck, and the other roller was operated by a similar lever at the south end of the log deck, which lever was operated by one of the carriage men. The sawyer's pit was a little lower than the log deck, and near the saw.

In the floor of the log deck were three large slots, about two feet wide, extending at right angles from the saw carriage into the log deck. The first and third of these slots were about six feet long; the second was about ten feet long. The first of these slots was about ten feet south from the sawyer, the second about sixteen feet, and the third about twenty-three feet south. In the first and third of these slots were what were called, "push arms," which were iron castings which worked on a hinge, and when not in use rested in the slots. These push arms were used for the purpose of pushing logs on to the carriage. The middle slot, which was the largest, having a length of about ten feet, was occupied by what was called the "nigger," or Simonson log roller. The body of the nigger was about the same shape as the push arms, but it had a large hinged hook on the top end of it, which hook could be used to pull a log from the carriage, while the push arms and the nigger itself were used to push or strike logs into position. When not in use, this hook folded down into the face of the nigger. When the nigger was not in use, it rested in the slot in the log deck, the same as the push arms.

These push arms and nigger were operated solely by the sawyer, by means of a single lever, held in his left hand, at his station in the saw pit. The movements of this lever were so arranged that the sawyer could either throw up

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the push arms and the nigger together, or throw up the push arms alone, or throw up the push arms and nigger and extend the hook forward over a log all at the same time. The nigger, however, could only be raised part of the way up, unless the push arms were already up, or were raised with it. The push arms and nigger constituted a very powerful machine by means of which the largest logs could be handled with the greatest ease, the motive power being steam, and the nigger having an independent piston capable of driving it against a log with great force. These push arms and nigger were used for placing logs on the saw carriage after the logs were placed within reach of them. The nigger was used only when the push arms were insufficient.

Across the floor of the log deck, and at right angles to the saw carriage, were skids of iron, about four inches high and a few feet apart, for logs to roll upon. One of these skids was about two feet from the nigger slot towards the sawyer's pit, and parallel with it. It was Mr. Dossett's duty to roll logs from the log deck on to the saw carriage, or within reach of the push arms. When the time came for a log to be placed upon the saw carriage, Mr. Dossett was required to wrap a chain around the log on the log deck, fasten one end of the chain, on which was a swamp hook, into the log, and hook the link on the other end of the chain into a chain on the overhead friction roller. Then, by means of the lever near the sawyer, he rolled the log down to the saw carriage, or within reach of the push arms. Sometimes logs were placed on the saw carriage without the use of the push arms. When the chain on the log was no longer needed to place the log on the carriage, it was Dossett's duty to remove the chain from the log as speedily as possible, and make ready for another log when needed. He had been working around the mill for about four years, but had been filling the position of log deck man about three weeks, only, at the time of his injury. He had been requested by

the sawyer to be more prompt in getting his chain off the logs.

At the time of the accident, a log about thirty-six feet long, and about four feet in diameter, was being rolled down by respondent from the log deck on to the saw carriage, by means of the friction roller operated by the lever behind the sawyer. This log was larger at one end than at the other, and did not come squarely on to the carriage. Mr. McAnally thereupon directed respondent to stop the use of that roller, and to change the position of the chain, and to attach it to the other roller. At the same time, Mr. McAnally directed Mr. Giese, one of the doggers, to go to the friction roll at the south end of the log deck, and operate that lever so as to roll the log down. By this rear lever, the log was rolled further down, but would not go upon the carriage as required.

Mr. McAnally thereupon brought up the push arms to drive the log into position. Respondent then went up to the log for the purpose of removing the chain. He was standing with his back toward the sawyer, and by the side of the slot in which the nigger lay. Mr. Giese gave the chain some slack so that it could be removed. Respondent thereupon placed his back to the log and reached across the line of the nigger slot to jerk the chain loose from the log. At the instant he did this, Mr. McAnally brought up the nigger, which struck respondent on his side and stunned him, so that he fell or slid down, with his arm crossing the nigger which was still pushing against the log, so that the blade of the hook crushed his arm practically off near the shoulder. The arm was immediately afterwards amputated. Respondent was in plain view of Mr. McAnally, about twenty feet from him, and Mr. McAnally was looking in the direction of respondent. He could have readily seen him. The foregoing facts are not disputed.

There was some evidence to the effect that respondent was not supposed to remove the chain until the doggers had

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set their dogs, and that, until this was done, and while the push arms were up, the sawyer was at liberty to use the nigger, and if the push arms were not sufficient to place the log in its proper position on the carriage, the nigger was then put into use. There was some evidence to the effect that, when the push arms were in use, it was respondent's duty to immediately remove the chain, unless ordered not to do so by the sawyer.

A demurrer to the complaint was denied, and at the conclusion of plaintiff's evidence, defendant's motion for a nonsuit was also denied, appellant contending then, as it does now, that the allegations of the complaint and the facts proven and admitted on the trial show, as a matter of law, that the respondent and the sawyer McAnally were engaged in a common employment as fellow servants, and each was bound to know what the other was doing, and bound to look out for his own safety, and that there was no duty of the master to warn one servant against the conduct of a fellow servant. This same question was also presented to the lower court upon a motion for a new trial after verdict.

Since the appeal in this case, and since the arguments of counsel, we have recently had the same question under consideration in the case of *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114, which was a case similar in all its essential features to this case, and we there held that the sawyer was a vice principal, upon whom rests the duty to warn a servant in a dangerous place, known, or which should have been known, by the sawyer, and unknown by the servant to be such, and that a failure of the sawyer to give warning under such circumstances is negligence of the master. This is not a new doctrine, and is based upon humanity and sound reason. The sawyer is in command and control of the servant, who is bound to obey. The sawyer sees and knows the position of the servant, who is

in the active discharge of his duties. The sawyer, alone, knows of an agency which he may or may not put into operation, which agency, when in operation, becomes dangerous and makes the place of the inferior servant dangerous. When such servant does not know, and has no means of knowing, the danger of the place, it is the imperative duty of the master to warn him thereof. This duty cannot be delegated so as to relieve the master of liability. To hold otherwise would relieve the master of his duty to furnish a reasonably safe place for the servant, and would permit a superior servant in control to take the life or limb of such inferior servant, without an opportunity for self-protection or escape. Neither the law nor the dictates of humanity permit such results. *Nelson v. Willey Steamship & Navigation Co.*, 26 Wash. 548, 67 Pac. 237; *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398; *Shannon v. Consolidated etc. Min. Co.*, 24 Wash. 119, 64 Pac. 169; *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896; *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713.

Upon the question of contributory negligence, we are satisfied after examining the evidence that there was no question for the court. The evidence was conflicting upon that point. It was a question, therefore, for the jury. Appellant invokes the rule in this case that, where there are two ways of doing a duty, one safe and the other dangerous, if the servant elects the dangerous way and is injured, he cannot recover, and cites authorities to that effect; and in that connection argues that the respondent could have walked around the nigger, instead of reaching across the plane of its action, and if he had done so, would not have been injured. It is sufficient to say, upon this point, that there was no apparent danger in reaching or stepping across the plane of the action of the nigger. While the nigger rested

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in its slot, and was not in use, there was no more danger in reaching across than there was in walking around. The place was apparently safe. It was, in fact, safe when respondent chose that way. There was no real danger unless the sawyer should put the nigger in operation. When he did so, the place became dangerous, but not until then. There was evidence to the effect that it was customary to cross this slot when the nigger was not in use; that, as soon as the push arms were up, it was respondent's duty to remove the chain, unless directed otherwise. He was not directed to leave the chain upon this occasion. If this evidence was true, respondent was justified in being where he was, and also in believing that the place was safe. This question was therefore one for the jury. The rule contended for cannot apply where both ways are safe.

It is argued, also, that the signal to remove the chain was the act of the doggers in setting their dogs. There was evidence to this effect, but this evidence was also disputed, as stated above. This fact was one for the jury, and not for the court, to find.

The complaint alleged that the sawyer was incompetent and habitually negligent and careless, and that the same was known to the appellant, and unknown to the respondent. It is also alleged that appellant was negligent, because it failed to provide a safe place for respondent to work, or safe methods and regulations. Appellant moved to strike out these paragraphs, which motion was denied. At the trial, the court permitted evidence to be introduced to the effect that, upon one occasion, about a month before the injury complained of in this case, Mr. McAnally, the sawyer, injured one of his men slightly, and narrowly averted a serious accident, which was generally discussed about the mill; and, also, evidence to the effect that McAnally was cross and irritable toward the men under him. The court refused to strike this evidence out of the case, and appellant

urges these rulings as error. We said, in *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310:

“Specific acts of incompetency of the pit boss were admissible in evidence under the general allegation that the pit boss was ignorant and incompetent, and under this allegation evidence was admissible that the pit boss did not have regard for the lives of the men under his charge, etc.”

Under this rule, the allegations in the complaint were sufficient, and the evidence offered was competent, and it was therefore not error to deny the motion to strike out the paragraphs of the complaint or to strike out the evidence. We are, however, of the opinion that there was not sufficient in this evidence to sustain a finding of negligence against appellant upon these grounds alone. If this were the only evidence of negligence in the case, we should not hesitate to dismiss the action. But there was clearly sufficient evidence upon other grounds hereinbefore discussed, and we are further clearly of the opinion that, if the court erred in refusing to strike this evidence, such error was harmless, because the court clearly and fairly instructed the jury as to what questions of negligence they might consider under the evidence, and the incompetency of the sawyer was not one of them.

Appellant also contends that the court erred in permitting three witnesses, who had been employed for a long time as sawyers in other mills, to testify as to the duties of sawyers under circumstances surrounding this accident. The testimony was in corroboration of witnesses who had already stated what were the rules in appellant's mill at the time of the accident. It is no doubt true that customs or rules in one mill are not necessarily the customs or rules adopted in others of the same kind and capacity, but we think it was not an abuse of discretion on the part of the trial court to receive evidence of this kind (*Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284), because reasonable rules and customs in mills of the same kind and capacity

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are generally the same, unless special conditions render different rules necessary or more convenient and adaptable. There was no error in receiving the testimony of these witnesses. Appellant in its briefs makes numerous objections to the instructions which the court gave to the jury. The most important of these objections are covered by what we have already said. We do not deem the other objections of sufficient merit to justify further discussion. It is sufficient to say that the instructions given by the court fully and fairly covered every theory of the case, and were as favorable to the appellant as could safely be given.

We find no reversible error in the record. The judgment is therefore affirmed.

HADLEY and DUNBAR, JJ., concur.

CROW, J., concurs in the result.

[No. 5617. Decided September 28, 1905.]

WALDEMAR P. WESTBY, *Respondent*, v. WASHINGTON BRICK,
LIME & MANUFACTURING COMPANY, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE—INJURY TO EMPLOYEE IN ROLLER CRUSHER—STARTING MACHINERY WITHOUT WARNING—VERDICT ON CONFLICTING EVIDENCE—REVIEW. A verdict of a jury upon the question of the negligence of the defendant and the contributory negligence of the plaintiff, in a personal injury case, will not be disturbed where it appears that the plaintiff was injured in a roller crusher by the starting of machinery which he was oiling, by reason of the fact that no warning was given, and there was conflicting evidence upon the question as to whether the customary warning was given.

RELEASE AND DISCHARGE—PROCURED BY FRAUD—VERDICT—REVIEW. The release of a claim for personal injuries secured by fraud is no defense to an action for damages, and the appellate court will not weigh conflicting evidence as to such release where there was sufficient testimony of fraud, if uncontradicted, to sustain the verdict.

¹Reported in 82 Pac. 271.

MASTER AND SERVANT—NEGLIGENCE—INDEMNITY—FACT THAT DEFENDANT CARRIES ACCIDENT INSURANCE—INTEREST OF WITNESS—MISCONDUCT OF COUNSEL. It is prejudicial error in a personal injury case for the plaintiff's counsel to continually ask questions with the evident intent to get before the jury the fact that the defendant carries accident insurance, and it is immaterial that the questions were asked for the purpose of impeaching the testimony of a witness.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered June 29, 1904, upon the verdict of a jury rendered in favor of the plaintiff for \$3,200 for personal injuries sustained by an employee through the starting of a roller crusher without warning. Reversed.

Danson & Huneke, for appellant.

Robertson, Miller & Rosenhaupt, and *B. M. Branford*, for respondent.

DUNBAR, J.—The respondent, a young man, twenty-four years old, had the tips of his fingers caught in a roller crusher in a brick factory, which was owned and operated by the appellant, in Spokane county. His left arm was drawn through the roller crusher, badly breaking and mangling it, and tearing the ligaments so that the arm had to be amputated; also, mangling his shoulder to a certain extent, where the crusher stopped. The complaint alleged negligence on the part of the defendant, in that it furnished the plaintiff with defective machinery to work with, and that it failed to give the notice of the starting of the engine which set in motion the machine, which the plaintiff was oiling, so that he could have time to escape the dangerous cog wheels which were the cause of his injury; alleged that the defendant had adopted a rule of warning, which the plaintiff relied upon, and that said warning was not given him on the morning on which the accident occurred. Upon the trial of the cause, on the completion of the plaintiff's testimony, defendant moved for a nonsuit; which motion was refused by the court. Again, at the

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close of the whole testimony, the motion was renewed and refused; the jury returned a verdict in favor of plaintiff for \$3,200, judgment was entered upon such verdict, and from such judgment, this appeal is prosecuted.

The errors assigned are, (1) the refusal of the court to grant defendant's motion made at the end of plaintiff's case; (2) the failure of the court to grant defendant's motion made after all the testimony was in; (3) the failure of the court to grant defendant's motion for a new trial; (4) error of the court in refusing to give instruction No. 1, requested by the defendant, said instruction being that the jury return a verdict for the defendant. When the case was submitted to the jury, the court, for reasons which do not appear in the record, withdrew from the jury the question of defective machinery. This order of the court was excepted to by the plaintiff, but as the plaintiff has not appealed, the judgment having been in his favor, it is not necessary for us to pass any opinion on the correctness of such order.

Most of the assignments of error can be noticed together, as they all practically involve the question whether or not the testimony showed negligence on the part of the appellant, or contributory negligence on the part of the respondent. It may be stated here that the appellant in its answer, outside of the ordinary denials of negligence and assertion of contributory negligence, alleged a settlement with the respondent, wherein the appellant was released from all liability on account of the accident. This was denied by the respondent, who alleged that, if such release had been executed, it had been executed at a time when he was unable to contract, by reason of his bodily suffering, and that it was a fraud perpetrated upon him by the appellant.

It is contended by the appellant that, by a rule and custom, it blew two small whistles a few minutes before the engine, which put the machinery of the factory in operation, com-

menced to work, and one large whistle when the work commenced; and that the testimony shows conclusively that this notice was given to the respondent. But if the testimony of the respondent and his witnesses is to be believed, the jury might well conclude, either that the whistle was not of sufficient volume to be heard at the place where the respondent was at work, in the performance of his duty oiling the machine which he was operating, or that the whistle was not sounded on that particular morning. The respondent also testified, and this testimony was corroborated by other of his witnesses, that it was the custom, before the belt was put on, to ask him if he was ready, and if he said he was, the belt was put on and the machinery started; and if he said he was not, the men above waited until he responded that he was ready; that it was the custom also to throw the belt off at night, and hang it up on a pulley, and that this morning, when he went to work, the belt was on and that he did not know that it was on, and was not questioned as to whether he was ready or not.

On the proposition of the settlement, the testimony is absolutely conflicting. But if the statements of the respondent and his witnesses are true, the execution of the alleged release was the perpetration upon him of a most flagrant and palpable fraud. These questions having been submitted to the jury, under proper instructions, there being no assignment of erroneous instructions, and the testimony being sufficient, if uncontradicted, to sustain a judgment, this court will not undertake to weigh such testimony. If it did, it would simply be the substitution of the judgment of this court for the judgment of the jury on the weight of the testimony and the credibility of the witnesses, a substitution not authorized by the law.

There is, however, one assignment of error, the rightful determination of which will, we think, necessitate the reversal of this cause, and that is the alleged misconduct of

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the respondent's attorney at the trial of said cause, whereby appellant was prevented from having a fair trial. J. H. Spear, manager of the appellant corporation, had testified in relation to the alleged settlement with the respondent, that he had paid certain bills by check. Counsel for the respondent, on cross-examination, made the following interrogatory statement:

"Now, as a matter of fact, sir, every dollar of that money was paid by other parties, the insurance company? Answer: No, sir. Question: Were you not insured? Mr. Danson [appellant's counsel]: We object as immaterial. It is not a proper question and he knows it. The Court: Sustain the objection."

Many more questions were asked by counsel for the respondent upon the same line, with relation to settlements made by the company with one Albert Lutness, where the question was asked: "Now, is it not a fact that every dollar in the Lutness suit was paid by the Casualty Company of Maryland, instead of by the Washington Brick & Lime Company?" This subject was pursued by counsel notwithstanding the continuous objections and overruling of this character of questions by the court. It is earnestly contended by the respondent that the questions were asked for the purpose of impeaching the veracity of the witness Spear; that, inasmuch as he had said that he had paid it, they had a right to show that somebody else paid it. But we do not think there is any merit in this argument. The whole examination shows that it was made for the purpose of getting before the jury the fact that an insurance company, and not the local defendant in the case, would be called upon to respond to such damages as the jury assessed; and the case we think falls squarely within the spirit of the rule announced by this court in *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202; *Lowsit v. Seattle Lumber Co.*, 38 Wash. 290, 80 Pac. 431; and *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831.

For error in this respect, the judgment will be reversed, and the cause remanded for a new trial.

MOUNT, C. J., ROOT, and HADLEY, JJ., concur.

FULLERTON, J., took no part.

[No. 5607. Decided September 28, 1905.]

FRANK H. PAUL, *Appellant*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS—CONTRACTS—VALIDITY—AUTHORITY OF OFFICERS TO EXECUTE—MODE OF EXECUTION PRESCRIBED BY ORDINANCE—RATIFICATION OF INVALID IMPLIED CONTRACT. Under Seattle city charter, art. 4, § 27, providing that no debt or obligation shall be created except by ordinance, and § 28, providing that no officer shall have power to ratify any invalid claim, a contract for commissions for effecting a sale of municipal bonds, made by the city comptroller and the finance committee of the city council, is unenforceable; and the fact that the city had accepted the benefits of the services cannot amount to a ratification.

SAME—CUSTOM—NONCOMPLIANCE WITH REQUIREMENTS. The custom of a city to vest its financial control and management in its comptroller and chairman of the finance committee and to adopt the practice and custom of entering into contracts through such officers without strict compliance with the requirements of the charter, cannot bind the city on a contract not executed or authorized in the manner provided in the charter.

SAME—RATIFICATION OF IMPLIED CONTRACT—TO BE BY ORDINANCE. A municipal contract not made in compliance with the requirements of the provisions of the charter requiring it to be by ordinance cannot be ratified except by ordinance.

SAME—RECEIPT OF BENEFITS—ESTOPPEL. Where a municipal contract is not executed in the manner required by charter, no estoppel arises against the city by reason of the fact that the contract had been fully executed and the city has received the benefits thereof.

Appeal from a judgment of the superior court for King county, Griffin, J., entered December 17, 1904, in favor of

¹Reported in 82 Pac. 601.

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the defendant, dismissing an action on contract, upon sustaining a demurrer to the complaint. Affirmed.

Geo. F. Aust and W. R. Bell, for appellant.

William Parmerlee (Scott Calhoun, of counsel), for respondent.

CROW, J.—This action was brought by appellant to recover a brokerage or commission, claimed by him on the sale of certain municipal bonds. The only question involved is the sufficiency of the complaint which, omitting its formal parts, reads as follows:

“(1) That at all the times herein mentioned the plaintiff was, and now is, engaged in the business of bond brokerage, buying, selling and negotiating for the sale of bonds and other securities, both municipal and private.

“(2) That at all times herein mentioned the defendant was, and now is, a municipal corporation of the first class organized and existing under and by virtue of the laws of the state of Washington.

“(3) That by authority of and pursuant to chapter 85 of the Laws of 1901, passed by the legislature of the state of Washington, the city council of the defendant did, on the 30th day of January, 1902, duly enact an ordinance that a proposal of the plans for the erection and construction of a municipal lighting plant for the city of Seattle, together with a proposal that the city of Seattle issue its bonds in the sum of \$590,000 to pay for the acquisition of the necessary property therefor and for the expenses and costs of constructing, erecting and equipping such plant, should be submitted to the qualified voters of the city of Seattle, for their approval or rejection, all as provided in said act of the legislature.

“(4) That pursuant to said act and said ordinance, the said two proposition were duly submitted to the said qualified voters and both of the same duly authorized by a vote of more than three-fifths of the said qualified voters being in favor thereof.

“(5) That pursuant to said act, ordinance and ratification, the city comptroller of the city of Seattle duly adver-

tised for bids for the purchase of said bonds, and on the 9th day of May, 1903, in the presence of the corporate authorities and the city treasurer, did duly open all of the bids submitted; that only one bid was submitted and that one was for the bonds at par providing the same bore not less than four and one-half per cent interest, payable semi-annually.

"(6) That the ordinance submitting the said proposition of issuing said bonds and the proposal voted upon by the said voters each provided that the said bonds should be sold so that the city should not pay more than four per cent interest upon the par value of said bonds.

"(7) That by reason of the acts of the officers and servants of the city having in charge the construction of said lighting plant there had been prior to the said 9th day of May, 1903, large sums of money drawn from the general fund for the expenses of preliminary construction of said plant and the acquisition of the necessary right of way, and there had up to said day been devoted to said purpose not less than sixty thousand dollars, all drawn from said general fund with the expectation and purpose to repay the same to said general fund upon the sale of said bonds. That on said day, and for a long time prior thereto, the withdrawal of said sum from said general fund had been keenly felt by the city, and the immediate return of said sum to said general fund was sorely needed; that the said general fund was then practically exhausted; there was urgent need of money in that fund and the only source of obtaining the same was the sale of said bonds and a return to said general fund from the amount realized upon such sale the aforesaid sum of over sixty thousand dollars. That the price of money at said time was advancing instead of cheapening, and the prospects for a sale were bad.

"(8) That for years it had been the custom for the city of Seattle to vest its financial control and management to its comptroller and chairman of its finance committee. That these officers had for years cast upon them and had exercised such general supervision and management, all of which was acquiesced in and recognized by all the departments and officers and agents of the city, and by the general public. That prior to said day the acts of said officers, their prom-

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ises, agreements and contracts of employment, when made for the best interests of the city, had always been ratified.

"(9) That shortly after the said 9th day of May, 1903, the city of Seattle, by its comptroller, acting upon his own official behalf and by instruction of the finance committee and its chairman aforesaid, employed this plaintiff to obtain a purchaser of said bonds.

"(10) That plaintiff succeeded in obtaining such purchaser, all as employed to do, and the city sold the entire issue of said bonds to such purchaser at par, the bonds bearing interest at three and three-quarters per cent per annum, payable semi-annually; that in the procuring thereof plaintiff did expend much and valuable time and effort, and did expend considerable sums of money in the payment of the necessary hotel and traveling expenses incurred while engaged in his said employment.

"(11) That without the services of this plaintiff, the defendant could not have sold said bonds at par bearing a less rate of interest than four per cent.

"(12) That by reason of the services rendered by plaintiff as aforementioned, the defendant was extricated from its then financial straits, its credit was re-established and greatly enhanced, the proposition submitted to the people was made possible of execution, and the said defendant's general fund had restored to it the said sum of sixty thousand dollars which it had previously loaned.

"(13) That the actual financial saving to the city in interest agreed to be paid on said bonds, to wit, the difference in interest between the amount of said bonds as bearing four per cent, which was the best the city could have done but for the plaintiff's services, and three and three-quarters per cent, the rate borne by the bonds as sold by plaintiff, is \$29,500. That the compound interest upon the semi-annual payments of interest for the time the bonds are to run, will amount to at least the sum of \$18,000, and the total saving in interest to the defendant by reason of plaintiff's said services, is at least the sum of \$47,500.

"(14) That the plaintiff occupied many days time in effecting said sale, and during all of said time it was well known to said defendant, its comptroller, the chairman of its finance committee aforesaid, and a majority of the members of its city council, that plaintiff was at defendant's

request engaged in the effort to sell said bonds; that he was expending his time and money in so doing; that his services were of great value; that the same were to be paid for by defendant; that his employment had been and was on behalf of said city through its agents aforesaid; that he had been promised by said agents compensation therefor, and that a majority of the members of the city council had promised that he should be compensated therefor.

"(15) That the plaintiff rendered said services and expended the said sums under the full belief that he would be compensated therefor; and the defendant, its comptroller, a majority of the finance committee, including its chairman, and a majority of the members of its city council, at all times knowing that he was so believing and that he had been by the said officers promised compensation for his services, did accept said services and continue to accept the same, and did accept the offer of the purchaser procured by plaintiff as aforesaid, at all times knowing that said plaintiff had procured such purchaser under the aforesaid promises and employment.

"(16) That the defendant refuses and for more than one year has refused to pay the plaintiff anything whatsoever on account of his said claim, and persistently contends that the plaintiff has no legal demand upon it. That for more than one year it has neglected and refused to act upon his said claim, though often requested so to do, and though the duly verified claim and demand was many months ago presented to it.

"(17) That the said bonds were sold on the 27th day of July, 1903.

"(18) That the reasonable value of plaintiff's services as aforesaid is the sum of fourteen thousand seven hundred and fifty dollars.

"(19) That the defendant will continue to retain all the aforesaid advantages gained by plaintiff's services, will not attempt or offer to reimburse plaintiff, and will, unless restrained by this court, seek to evade liability on the ground that the acts of its agents in the employment of the plaintiff were beyond the powers of such agents.

"(20) That if the acts of the said agents of the defendant were in excess of their powers, and the defendant is permitted to so urge, then this plaintiff will have no

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speedy or adequate remedy at law, or any remedy whatsoever.

“(21) That the defendant by reason of the aforesaid facts, is estopped to deny the legality of said contract of employment.”

To this complaint respondent interposed a general demurrer, which being sustained, appellant declined to plead further, and thereupon judgment was entered in favor of respondent, dismissing the action. From said final judgment, this appeal has been taken.

Appellant contends that the trial court erred in sustaining said demurrer, and also in entering judgment in favor of respondent. In his opening brief appellant says:

“It will be conceded, at the outset of this discussion, that the comptroller of the city of Seattle and the chairman of the finance committee, in entering into the contract referred to in the foregoing complaint, exceeded the authority vested in them by the charter of the city of Seattle, and if that contract were still executory, it would be unenforcible.”

Although appellant has conceded that no formal contract has been made with him by the respondent, in any manner required by the city charter, nevertheless he contends that he has fully completed an implied contract, which is now executed and not executory, and that, as the city has received and enjoyed the benefit of his services, such contract has been ratified, and the city should be estopped from denying liability. The principal cases relied upon by appellant in support of these propositions seem to be *Memphis Gas-Light Co. v. Memphis*, 93 Tenn. 612, 30 S. W. 25; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; and *Argenti v. San Francisco*, 16 Cal. 256. Other authorities are also cited, but the above-mentioned are the strongest in appellant's favor.

The case of *Memphis Gas-Light Co. v. Memphis*, *supra*, is based upon the California case of *San Francisco Gas Co. v. San Francisco*, *supra*; but the later doctrine of the California court on the questions here involved seems to be di-

rectly opposed to *San Francisco Gas Co. v. San Francisco*, and *Argenti v. San Francisco*, *supra*. See *Zottman v. San Francisco*, 20 Cal. 97, which has been followed and approved by this court in, *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063, in which Anders, J., at page 447, says:

“While a municipal corporation would, unless restricted by law, have a right to make contracts in reference to its corporate business in any manner it might deem proper, yet, where the mode of contracting is expressly provided by law, no other mode can be adopted which will bind the corporation. This principle results from the fact that municipal corporations derive all their powers from their charters. 1 Dill. Mun. Corp. (4th ed.) 449 (373); *Zottman v. San Francisco*, 20 Cal. 97; *McCoy v. Briant*, 53 Cal. 247; *McDonald v. Mayor*, 69 N. Y. 23; *Bladen v. Philadelphia*, 60 Pa. St. 464; *Allen v. Galveston*, 51 Tex. 302; *City of Bryan v. Page*, 51 Tex. 532; *Head v. Providence Insurance Co.*, 2 Cranch, 150. In the case last cited, Chief Justice Marshall, in speaking of the subject, said: ‘The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and, when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated.’ In fact, so far as we have observed, the authorities are practically uniform on this question.”

In *Bryan v. Page*, 51 Tex. 532, 32 Am. Rep. 637, cited by Anders, J., an action was commenced by an attorney at law to recover the reasonable value of professional services rendered by him to the city of Bryan, under an irregular employment, not made in strict accordance with the requirements of the city charter. Although the services had been fully rendered by the plaintiff, and although the city had accepted the same, and had acted upon plaintiff's advice, the Texas court held that plaintiff was not entitled to recover, that the defendant city was not estopped from denying liability under an implied contract, and that neither the mayor nor the common council had been author-

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ized to bind the city by a contract for legal counsel for their assistance, no ordinance having been passed in relation to such employment.

Sections 27 and 28 of art. 4 of the charter of the city of Seattle read as follows:

"§ 27. No debt or obligation of any kind against the city shall be created by the city council except by ordinance specifying the amount and object of such expenditure.

"§ 28. Neither the city council nor any officer, board, department or authority shall allow, make valid or in any manner recognize any demand against the city which was not at the time of its creation a valid claim against the same, nor shall they or any of them ever allow or authorize to be paid any demand which, without such action, would be invalid, or which shall then be barred by any statutes of limitation, or for which the city was never liable, and any such action shall be void."

These two sections clearly show, (1) that a contract, of the kind claimed by the appellant to have have been implied and afterwards ratified, could not be entered into or executed by the city comptroller or finance committee, but could only have been authorized by ordinance; (2) that appellant's demand, not having been valid at the time of its original creation, could not afterwards be made valid by the council or any board or officer of the city. It therefore follows that, although appellant has alleged that the officers and members of the city council knew he was rendering services with the expectation of compensation, and that said services had been accepted by the said city, such facts cannot amount to a legal ratification of any implied contract. His claim was originally invalid and, by reason of said § 28, has not been, and cannot be, made valid. Appellant is presumed to have had knowledge of the power and authority of the city comptroller and chairman of the finance committee, and also to have known of the provisions and requirements of the city charter, in regard to the making of any contract for his services. If he dealt with any city officers in a manner not in com-

pliance with the charter, he did so at his peril, and cannot now complain if respondent defends against his claim.

Appellant has alleged in his complaint that it had been the custom of respondent, for many years, to vest its financial control and management in its comptroller and the chairman of the finance committee; that for years these officers had exercised general supervision and management over respondent's financial affairs; and that their acts were acquiesced in and recognized by all departments and officers and agents of the city and by the general public; and now claims that, by reason of such custom, an implied contract arose between himself and respondent which was afterwards ratified. Any practice or custom of the officers of a municipal corporation in transacting business, not in strict compliance with the requirements of its charter, cannot bind such city on a contract not executed or authorized in the manner provided by such charter. *Wormstead v. Lynn*, 184 Mass. 425, 68 N. E. 841.

It also appears from the complaint that the appellant relies upon a ratification by respondent of his alleged implied contract. An allegation of ratification of a contract made in violation of a charter provision, is of no avail unless the acts relied upon for ratification would be sufficient to support a contract as an original proposition. In other words, if appellant be conceded to have had an implied contract irregularly made, and if it be further conceded that it could be ratified, such ratification could be by ordinance only. *Arnott v. Spokane*, *supra*; *Zottman v. San Francisco*, *supra*; *Beach, Public Corporations*, § 251; *Caxton Co. v. School District No. 5*, 120 Wis. 374, 98 N. W. 231.

In *Tiedeman, Municipal Corporations*, § 170, the author says:

"When the statutes prescribe a special mode in which alone a valid contract can be made by the municipality, and the contract is invalid, because of non-compliance with the statutory requirement, it must be observed in any act of ratifica-

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tion. Thus, where a corporation could only make a valid contract by ordinance, the ratification is required to be by ordinance, and cannot be ratified by a subsequent resolution."

From the above authorities and reasoning, we conclude that no implied contract between appellant and the city existed, and also that no contract was ratified by the city.

The only remaining question is whether said alleged implied contract, being now executed and not executory, the city was estopped from denying liability to the appellant, it having received and availed itself of the benefit of his services. While there is some conflict upon this proposition, we believe the weight of modern authority is to the effect that no such estoppel exists. *Arnott v. Spokane, supra*; *Chippewa Bridge Co. v. Durand* (Wis.), 99 N. W. 603; *Keane v. New York*, 88 App. Div. 542, 85 N. Y. Supp. 130.

We think the complaint fails to state a cause of action. No error was committed in sustaining the demurrer. The judgment is affirmed.

MOUNT, C. J., DUNBAR, HADLEY, and FULLERTON, JJ., concur.

[No. 5546. Decided September 29, 1905.]

J. M. COLEMAN *et al.*, Respondents, v. SAMUEL RATHBUN,
*as City Treasurer of Seattle, Appellant.*¹

MUNICIPAL CORPORATIONS — LOCAL ASSESSMENTS — FORECLOSURE — DEFENSES—TENDER OF AMOUNT DUE. In an action to restrain the foreclosure of a special assessment lien, in which the complaint alleges a tender of the amount due, the complaint states a cause upon which an unconditional judgment may be rendered, although it is not shown that the tender was kept good by bringing the money due into court, in the absence of a demand therefor at the time of entry of judgment or any request for a conditional judgment.

¹Reported in 82 Pac. 540.

SAME—ACTIONS—PARTIES PLAINTIFF—JOINDER—EQUITY—MULTIPLICITY OF SUITS. In order to avoid a multiplicity of suits, an action in equity against a municipality to restrain the enforcement of liens may be brought jointly by many plaintiffs owning separate parcels, but who are similarly affected by the threatened wrong.

Appeal from a judgment of the superior court for King county, Bell, J., entered August 15, 1904, in favor of the plaintiffs, upon overruling a demurrer to the complaint, in an action to restrain the foreclosure of special assessments levied by a city. *Affirmed.*

Mitchell Gilliam and Wm. Parmerlee, for appellant.

Wakefield & Petrovitsky, for respondents.

DUNBAR, J.—This case involves a question of whether or not plaintiffs' complaint states a cause of action, a demurrer having been interposed to the complaint to the effect that it did not state a cause of action, which demurrer was overruled. Judgment was entered in favor of the plaintiffs, and the appeal is from said judgment.

The complaint alleges, in substance, that improvements were made in a certain district in the city of Seattle, and an assessment was made therefor; that the plaintiff J. M. Coleman is owner in fee of certain property included in the said assessment district, and that it is assessed by the aforesaid assessment as follows (here follows the description of the lots and blocks and the assessment of each particular tract); that plaintiff Ella Strong is owner in fee of certain property included in said assessment district and assessed by the aforesaid assessment as follows (with the same specifications as to lots and values); that plaintiff James Masterson is owner in fee of certain property included and assessed in the aforesaid assessment district as follows, etc.; that plaintiff Lillie Ogden is owner in fee of certain property included and assessed in the aforesaid assessment district as follows (with the same statement as in the other counts); that plaintiffs filed objections to the assess-

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ment roll, etc.; that the proceedings under the ordinance providing for the assessment were an abuse of power, illegal and irregular, etc.; that thereafter, on the 18th day of March, 1904, by ordinance No. 10719, it was resolved, and became a law on the 19th day of March, 1904, that the said assessments against the plaintiffs' property be rebated and remitted to the amount of the sum of \$83, the same being one-half of the original assessment against the property of said plaintiffs; that since the passage of the said ordinance No. 10719, the plaintiffs, by their attorneys, have at divers times tendered to defendant the sums and amounts of the original assessment against the said property of the said plaintiffs, less the amount rebated and remitted by said ordinance No. 10719, and that the plaintiffs are now, and have ever been, ready to pay the said assessment as rebated by said ordinance No. 10719; that the defendant has refused to accept the same, and is about to foreclose the said liens as charged by the original assessment, under ordinance No. 8901, and costs; alleges that plaintiffs are without any adequate remedy at law; and prays that the city be restrained from the foreclosure of the said property and the collection of the aforesaid assessment.

It is contended by the appellant that the court erred in rendering an unconditional judgment, and in overruling defendant's demurrer to the complaint because of the failure to show tender kept good by bringing money due into court, and by reason of the misjoinder of parties plaintiff. The record does not show any application on the part of the city for a conditional judgment, which would probably have been granted by the court, had its attention been called to the matter. Neither do we think that the complaint was faulty for the reason that the tender was not kept good, in the absence of a demand on the part of the appellant to make the tender good at the time the judgment was entered, or demand that the judgment be conditional, to the effect

that the city be restrained upon the payment of the amount admitted to be due by the plaintiffs. If the allegations of this complaint are true, it is difficult to see how a lawsuit could arise, because, if they are true, manifestly the city should have accepted the amount tendered and relieved the plaintiffs of the necessity of bringing the action which they did bring.

The demurrer, however, raises one question which is important as a question of practice, viz., the misjoinder of parties plaintiff. It is true that almost universal authority, under statutes like ours, is to the effect that, where two or more join in an action, the complaint must show a right of action in both or all of them, or that it will be held insufficient, on demurrer stating that it does not state facts sufficient to constitute a cause of action, and many cases are cited by appellant that sustain this view. But these are mostly cases where individuals are bringing actions against each other, and can readily, we think, be distinguished in principle from the case at bar, where the threatened action of the municipality is the primary cause of a suit; and especially may this be true where the suit is a suit in equity to prevent a threatened injury, as in this cause.

Appellant cites an Oregon case, viz., *Cohen v. Ottenheimer*, 13 Ore. 220, 10 Pac. 20, with a statement that that case decides the exact question presented here, and that, inasmuch as the Oregon statute is the parent of our statute, they being identical in this respect, the case ought to have great weight with this court. But in that case the question at issue here was not involved. The question decided there was that, when it was shown upon the face of the complaint that the presence of other parties, not brought in, was necessary to a complete determination of the controversy, a demurrer would lie for a defect of parties plaintiff or defendant, but not where there were already too many

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brought in. There is, however, an Oregon case, viz., *Paulson v. Portland*, 16 Ore. 450, 19 Pac. 450, 1 L. R. A. 673, where this very question was discussed and decided. In that case the respondents, consisting of about two hundred persons, brought a suit in the circuit court to enjoin the collection of an assessment for the construction of a sewer, in the north part of the city of Portland, the city council having previously thereto passed an ordinance providing for the construction of said sewer. The appellants interposed a demurrer to the respondents' complaint, upon the grounds, (1) that there was a misjoinder of parties plaintiff, in that, to wit, there were numerous persons, owning separate and distinct parcels of land, not similarly situated, nor similarly affected by the matter alleged in the complaint, and not having any unity of interest in the subject of the suit or the relief demanded, joined as plaintiffs; (2) that there was a defect of parties in that, to wit, there was no such unity of interest among the said plaintiffs in the subject of the suit, or the relief demanded therein, as entitled them to be so joined. The circuit court overruled the demurrer. The case was carried to the supreme court and, in discussing this proposition, the court said:

"The plaintiffs' interests were, it is true, distinct and different in extent, and very likely were not similiarly affected; but the cause was common to them all, and their respective remedies for redress or prevention were the same. The case would be analogous to that of a nuisance affecting several owners of real property, where it is a common injury to them all, and they each have the same character of remedy to abate it. I think that in all cases where parties are threatened with injury from one wrong, they have a sufficient community of interest to entitle them to unite as plaintiffs in a suit to prevent it, although their interests are distinct and affected to a different extent. Such a rule should be maintained in order to prevent a multiplicity of suits, and is now, as shown by the authorities cited by the respondents' counsel, well established."

This court also, in *Peterson v. Sayward*, 9 Wash. 503, 37 Pac. 657, sustained a complaint in an action of damages against a party who had destroyed logs upon which different individuals had liens, the action having been brought jointly by the different individuals damaged. We think that, in cases of this kind, public policy would best be subserved by allowing parties who would be similarly affected—not necessarily as to amount, but as to the legal effect on their property—by the threatened action of the municipality, to join in the prosecution of an action for equitable relief, in order to avoid a multiplicity of suits and expensive litigation over small amounts.

The judgment is affirmed.

MOUNT, C. J., ROOT, HADLEY, CROW, FULLERTON, and
RUDKIN, JJ., concur.

[No. 5679. Decided September 29, 1905.]

GEORGE OTT *et al.*, Appellants, v. PRESS PUBLISHING
COMPANY, Respondent.¹

LIBEL—DAMAGES—MENTAL SUFFERING. Damages for mental suffering may be recovered in an action for a newspaper libel.

LIBEL—DAMAGES FOR MENTAL PAIN AND SUFFERING—INSTRUCTIONS. Error in instructing, in an action for libel, that damages cannot be recovered for mental pain and suffering, is cured where the words were actionable *per se* and the jury were instructed that it was not necessary to prove damages, but found for the defendant upon evidence sufficient to sustain the defense of the truth of the publication.

SAME—MENTAL PAIN AND SUFFERING—MITIGATING CIRCUMSTANCES—ADMISSIBILITY. In an action for libel, where evidence is received of damages for mental pain and suffering, it is proper, under Bal. Code, § 4939, to receive evidence in mitigation of such damages.

SAME—ERRONEOUS ADMISSION OF OTHER PUBLICATIONS—APPELLANT INVITING ERROR BY INTRODUCING EVIDENCE OF ADMITTED PUBLICATIONS. In an action for a newspaper libel of an employment agency, in

¹Reported in 82 Pac. 403.

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which the publication was admitted, and the plaintiff nevertheless insists upon introducing the paper to show the manner in which the article was published and placed before the public, it is not error to permit the defendant to introduce other issues of the paper containing similar articles concerning other employment agencies; since the plaintiff opened the door for that class of evidence.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered February 13, 1905, upon the verdict of a jury rendered in favor of the defendant, in an action for libel. Affirmed.

Franklin P. Speck and Harris Baldwin, for appellants.
Graves & Graves and B. H. Kizer, for respondent.

CROW, J.—Appellants, who are husband and wife, were, on April 12, 1904, and for some time prior thereto had been, engaged in the business of conducting an employment agency in the city of Spokane. On said date respondent, being the owner and publisher of the Spokane Press, a daily newspaper in said city, published an article relative to appellants' business, which article they claimed to be libelous, and this action was brought to recover damages resulting therefrom. It would not serve any needful purpose to reproduce the article in this opinion. The trial court held the words therein contained, if false, to have been actionable *per se*, and this holding was not resisted by respondent. From April 10 to April 16, 1904, inclusive, respondent published a number of similar articles in reference to other employment agencies. Appellants alleged that, by the publication and circulation of said article, they had suffered great shame, humiliation, sense of disgrace, and infamy, to their damage in the sum of \$10,000, and had also suffered loss in their business to their further damage in the sum of \$1,000. The article was set forth in the complaint word for word as published.

Respondent admitted its publication, denied its falsity or malice, and pleaded affirmatively, (1) that the article was

true; (2) that it was a fair and true report of interviews had with appellants; (3) that, in making said interviews and publishing said article, respondent had exercised the utmost care to secure a truthful report, and that it had published said article in good faith in the performance of what it believed to be its duty in conducting a public journal. These allegations being denied, a jury trial resulted in a verdict for respondent, and from a judgment entered thereon, this appeal has been taken.

Appellants contend that the trial court erred in instructing the jury that they could not recover any damages for mental suffering. Evidence had been offered and admitted for the purpose of showing mental suffering, upon the part of each of the appellants, caused by said publication. Undisputed evidence was also admitted showing appellants' loss of business, sufficient to have entitled them to a verdict awarding them damages for some amount for such loss, had the words published been shown to be false. We are of opinion that, ordinarily in a case of this character, such an instruction, given without explanation or qualification, would constitute prejudicial error, as upon a proper showing damages for mental pain and suffering may be recovered. *Davis v. Tacoma R. & Power Co.*, 35 Wash. 203, 77 Pac. 209.

In view of the entire record, however, we do not think the giving of said instruction entitles appellants to a reversal, the verdict having made the same immaterial. The trial court further instructed the jury that the words contained in the article were libelous and actionable *per se*; that, if they were not true, it was unnecessary for appellants to prove damages, as in such an action the law itself presumes damages to have resulted from the publication, and that, in such event, a jury, if they found the words to have been false, must find for appellants. The jury were also instructed as follows:

"The defendant in this case pleads as an affirmative defense that the publication complained of by the plaintiffs

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is true. I instruct you, gentlemen of the jury, that, in an action for damages for libel, truth of the publication is a complete defense. If the publication complained of purports to be an interview with the plaintiffs, or either of them, and the evidence shows that the interview as published was reasonably correct and substantially a true account of the interview, the defense is complete. If, therefore, you should find from the evidence that the publication upon which this action was brought purported to be an interview with the plaintiffs, and you should further find that the interview as published by the defendant is reasonably correct and substantially a true account of the interview, then plaintiffs cannot recover, and you will find a verdict for the defendant."

Under these instructions, we fail to see how the jury could have misunderstood the court as to the effect of either the truthfulness or the falsity of the article published. There was ample evidence to sustain a finding of its truth, and by returning a verdict for respondent the jury undoubtedly made such finding. Conceding, therefore, that the instruction refusing damages for mental pain was erroneous, such error could not have been prejudicial, as by reason of the truth of the publication, which must have been found by the jury, appellants were not entitled to recover any damages whatever. *Haynes v. Spokane Chronicle Pub. Co.*, 11 Wash. 503, 39 Pac. 969.

The appellants' next assignment of error is based upon the action of the court in permitting respondent to introduce evidence showing, (1) the directions given by the editor to the reporter who wrote the article; (2) as to conversations between the editor and reporter; (3) as to who accompanied the reporter sent in search of information to which the libel relates; (4) as to how often reports were made to the editor; and (5) as to the motive of respondent in publishing the libel. It is not necessary to state in detail the evidence complained of, which was introduced for the purpose of showing all the surrounding circumstances in

mitigation of damages. It is not denied by appellants that this evidence would have been admissible under Bal. Code, § 4939, except for the ruling of this court in *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. 842, 11 L. R. A. 689, holding that punitive damages cannot be recovered in this state. The said section 4939, reads as follows:

“In an action mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.”

Appellants' theory is that the only damages which could be mitigated would be punitive, their argument being that actual damages, being compensatory only, could not be mitigated, and that evidence of mitigating circumstances should not have been admitted for the purpose of reducing other damages which would be punitive in their character and not recoverable. In answer to this argument it is only necessary to suggest that the doctrine in regard to punitive damages announced in *Spokane Truck & Dray Co. v. Hoefer*, *supra*, did not, when so announced become for the first time a new law of this state, modifying or changing any existing statute. We simply declared and interpreted the law as it already existed prior to the enactment of said § 4939, *supra*. In the later case of *Levy v. Fleischner*, 12 Wash. 15, 40 Pac. 384, Dunbar, J., after having distinguished punitive from actual damages, in a further discussion of the different classes of actual damages, said:

“We do not mean by the term ‘actual damages,’ the actual damages expressed by the statute, of course, such actual damages as could be definitely determined as the actual loss which the debtor would incur by reason of the attachment, and which loss could be determined or computed; but an undetermined loss and damage which is no less actual by reason of its indeterminate character; such as damage to reputa-

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tion, damage to pride and to feeling, and damages of that character, some of which, it is true, are more or less sentimental; . . .”

Our interpretation of the above language is that, as distinguished from punitive damages, there may be two classes of actual damages. Appellants separately claimed actual damages for mental pain and suffering, and for injury to business. While damages for mental pain and suffering may be, and sometimes are, recognized as actual, as distinguished from punitive damages, nevertheless they are, to a certain extent, indefinite, and their value must in all cases be fixed by the jury, in view of all the facts and circumstances surrounding any particular case. In this action appellants were permitted to introduce evidence showing damages of this character, and under said section 4939, *supra*, evidence of mitigating circumstances was certainly admissible as affecting such actual damages. In any event, the statute expressly provides that such evidence may be admitted, and it would be improper for us, in the face of such statute, to hold that it should be rejected.

As above stated, the article complained of was pleaded in the complaint *in haec verba*, and its publication was admitted by the answer, becoming an established fact which it was not necessary for appellants to prove. Appellants nevertheless introduced a copy of the Spokane Press of April 11, 1904, containing said article, although counsel for respondent at the time called their attention to the fact that its publication was so admitted. Appellants, however, insisted that they be permitted to introduce the paper for the purpose of showing the manner in which it was published and placed before the public. The entire paper was introduced, and contained similar articles concerning other employment agencies. Afterwards respondent offered a paper of April 10, a prior date, also containing similar articles as to other agencies, which was admitted without objection,

at least appellants have assigned no error upon its admission. Thereafter respondent also offered in evidence subsequent issues of said paper of April 14, 15, and 16, containing similar articles. To this offer appellants objected on the ground of incompetency and immateriality, which objection being overruled, they have assigned error. We think these papers containing such subsequent publications in regard to other employment agencies were subject to the objection of being incompetent and immaterial, but fail to see how appellants are in a position to complain. They opened the way for evidence of this character by introducing the paper of April 12, 1904, which contained similar articles. It was unnecessary to do this, as the publication of the article referring to themselves had been admitted. Hence appellants are in no position to claim that the admission of the later issues of the paper constituted prejudicial error. *Wilson v. Gibson*, 63 Mo. App. 656; *Wheeler v. Moore*, 22 Ind. App. 186, 53 N. E. 426; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175; *Beck v. Biggers*, 66 Ark. 292.

The judgment is affirmed.

MOUNT, C. J., ROOT, RUDKIN, DUNBAR, and HADLEY, JJ., concur.

FULLERTON, J., took no part.

[No. 5336. Decided September 30, 1905.]

NICOMEN BOOM COMPANY, *Appellant*, v. NORTH SHORE
BOOM & DRIVING COMPANY, *Respondent*.¹

LOGS AND LOGGING — BOOMAGE CORPORATIONS — LOCATION — PREFERENCE RIGHTS—FUTURE NEEDS OF PUBLIC. A boom company being, under the statute of this state, a public service corporation, has a preference right to construct a boom within its located territory, in analogy to the rights of a railroad company conferred by its selection of a route, and it has the right to anticipate the future needs of service for the public.

SAME—NON-USER OF PART OF LOCATION—NEEDS OF PUBLIC—EXTENSION OF BOOM—DILIGENCE. Nonuser of a portion of a boom company's location, duly appropriated by the filing of a plat and survey, does not constitute an abandonment of that part, when the needs of the public did not then require it, and it had constructed such portion of its works as were required by existing demands, and there was no lack of diligence to construct an extension of the boom over the portion not used.

SAME—DILIGENCE—EVIDENCE—SUFFICIENCY. A finding that there is no lack of diligence by a boom company in making use of its location is sustained, where it had always intended to make an extension when required, had spent \$16,000 on its primary location, which met present demands, and was proceeding to make an extension.

SAME—NON-USER—REVERSION OF CONDEMNED LANDS WHEN USE CEASES—LANDS NOT YET USED. Bal. Code, § 4378, providing that if the use of lands condemned for booming purposes shall cease for one year, they shall revert to the owner, applies only to lands condemned, and does not apply to lands located with reference to future needs the necessity for the use of which has not arisen.

SAME—MONOPOLY OF STREAM—GOOD FAITH OF LOCATOR—NECESSARY CONTROL OF STREAM. The argument against a monopoly does not preclude a boom company from so locating its site as to control the booming on a certain river, if the available booming extent is such as to reasonably prevent the operation of more than one boom.

Appeal from a judgment of the superior court for Pacific county, Albertson, J., entered March 12, 1904, upon conclusions of law in favor of the defendant, after finding the

¹Reported in 82 Pac. 412.

facts on a trial on the merits before the court without a jury, dismissing an action to enjoin the construction of a boom. Reversed.

W. W. Cotton, James G. Wilson, Welsh Bros., W. B. Stratton, and W. H. Gudgel, for appellant.

(1) By filing its plat of location plaintiff acquired the prior right to the location for booming purposes, which right was in the nature of a lien on the location, which could not be defeated by a rival company subsequently filing a map covering the same property. *Rochester etc. R. Co. v. New York etc. R. Co.*, 110 N. Y. 128, 17 N. E. 680; *Barre R. Co. v. Montpelier etc. R. Co.* 61 Vt. 1, 17 Atl. 923, 15 Am. St. 877, 4 L. R. A. 785; *Sioux City etc. R. Co. v. Chicago etc. R. Co.*, 27 Fed. 770; *Morris etc. R. Co. v. Blair*, 9 N. J. Eq. 635; *Titusville etc. R. Co. v. Warren etc. R. Co.*, 12 Phila. 642; *Williamsport etc. R. Co. v. Philadelphia etc. R. Co.*, 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220; *Railway Co. v. Alling*, 99 U. S. 463, 25 L. Ed. 438; Lewis, Eminent Domain, § 306; Pierce, Railroads, p. 157; 2 Woods, Railway Law, § 237. A boom company like a railroad company has a discretion in selecting the location of its works. *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670.

(2) Plaintiff's right to use the upper portion of its located territory and property acquired for that purpose was not lost by the failure to construct its boom throughout the entire distance immediately. Plaintiff had the right to acquire property for the future necessities of its business. *Yost v. Philadelphia R. Co.*, 29 Leg. Int. 85; *Western Union Tel. Co. v. Pennsylvania etc. R. Co.*, 120 Fed. 362; *In re Staten Island Rap. Tran. Co.*, 103 N. Y. 251, 8 N. E. 548; *Pittsburg etc. R. Co. v. Peet*, 152 Pa. St. 488, 25 Atl. 612, 19 L. R. A. 467; *Kountze v. Proprietors of Morris Acqueduct*, 58 N. J. L. 303, 33 Atl. 252; *St. Louis etc. R. Co. v. Foltz*, 52 Fed. 627; *Lodge v. Philadelphia etc. R. Co.*, 8 Phila. 345;

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Citations of Counsel.

Pittsburg Junction R. Co.'s Appeal, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. 128; *Pennsylvania R. Co. v. National Docks etc. R. Co.*, 57 N. J. L. 86, 30 Atl. 183; *Pennsylvania R. Co. v. Borough of Freeport*, 138 Pa. St. 91, 20 Atl. 940..

(3) The failure to construct its boom works throughout the entire distance immediately was not an abandonment. Mere nonuser does not constitute abandonment. 3 Elliott, *Railroads*, § 931; *Townsend v. Michigan Cent. R. Co.*, 42 C. C. A. 570, 101 Fed. 757; *Roanoke Investment Co. v. Kansas City etc. R. Co.*, 108 Mo. 50, 17 S. W. 1000; *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. L. 474, 53 Atl. 699; *Denison etc. R. Co. v. St. Louis etc. R. Co.*, 96 Tex. 233, 72 S. W. 161, 201; *Welsh v. Taylor*, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535; *Weed v. McKeg*, 79 App. Div. 218, 79 N. Y. Supp. 807; *Durfee v. Peoria etc. R. Co.*, 140 Ill. 435, 30 N. E. 686; *Barlow v. Chicago etc. R. Co.*, 29 Iowa 276; *Columbus v. Columbus etc. R. Co.*, 37 Ind. 294; *St. Louis etc. R. Co. v. Foltz*, *supra*; *Morgan v. Des Moines etc. R. Co.*, 113 Iowa 561, 85 N. W. 902; *Conabeer v. New York etc. R. Co.*, 156 N. Y. 474, 51 N. E. 402; *Haight v. Littlefield*, 147 N. Y. 338, 41 N. E. 696; *Pennsylvania R. Co. v. Borough of Freeport*, *supra*; *Memphis etc. R. Co. v. Humphreys*, 65 Ark 631, 48 S. W. 86; *Kansas City & S. E. R. Co. v. Kansas City & S. W. R. Co.*, 129 Mo. 62, 31 S. W. 451; *Rutland R. Co. v. Chaffee*, 71 Vt. 84, 42 Atl. 984, 48 Atl. 699; *Scarritt v. Kansas City etc. R. Co.*, 148 Mo. 676, 50 S. W. 905; *Chicago etc. R. Co. v. Moulton etc. R. Co.*, 57 Iowa 249, 10 N. W. 639; *Eddy v. Chace*, 140 Mass. 471, 5 N. E. 306; *Johnston v. Hyde*, 33 N. J. Eq. 632.

(4) The question of forfeiture cannot be raised by defendant in this action. Such question can only be raised by the state in a direct proceeding in the nature of a *quo warranto* or *scire facias*. *Denison etc. R. Co. v. St. Louis etc. R. Co.*, *supra*; *Pittsburg V. & C. R. Co. v. Pittsburgh C. & S. L. R. Co.*, 159 Pa. St. 331, 28 Atl. 155; *Western Pennsylvania R. Co.'s Appeal*, 104 Pa. St. 399; *Chicago etc. R.*

Co. v. Wright, 153 Ill. 307, 38 N. E. 1062; *Bravard v. Cincinnati etc. R. Co.*, 115 Ind. 1, 17 N. E. 183; *Cincinnati etc. R. Co. v. Clifford*, 113 Ind. 460, 15 N. E. 524; *Nicolai v. Maryland Agricultural etc. Ass'n*, 96 Md. 323, 53 Atl. 965.

(5) Nonuser of property acquired for booming purposes in a manner otherwise than by the exercise of the right of eminent domain does not constitute forfeiture. Bal. Code, §§ 4378, 4388; *Pittsburgh etc. R. Co. v. Pittsburgh C. & S. L. R. Co.*, 159 Pa. St. 331, 28 Atl. 155. See, also, authorities cited under point 2. The statute providing for forfeiture if the use for certain purposes shall "cease" for a certain period does not apply to a case where land had been acquired for a purpose and not yet used. *Jordan v. Haskell*, 63 Me. 189.

(6) The defendant having filed its map of location and acquired its property subsequently to the plaintiff's, with knowledge of the plaintiff's rights in the location, acquired no right to construct its boom. *Railway Co. v. Alling, supra*; *Morris etc. R. Co. v. Blair, supra*; *Titusville etc. R. Co. v. Warren etc. R. Co., supra*; *Barre R. Co. v. Montpelier etc. R. Co., supra*; *Wilkesbarre etc. R. Co. v. Danville etc. R. Co.*, 29 Leg. Int. 373.

(7) Since the passage of the river and harbor act, a compliance with both the United States requirements and the state requirements and the joint assent or permit of both authorities is necessary to render an obstruction in a navigable stream of the United States legal. 26 Stat. 436, 454; 27 Stat. 88, 110; 30 Stat. 1121, 1151; *Cummings v. Chicago*, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525; *Montgomery v. Portland*, 190 U. S. 89, 23 Sup. Ct. 735, 47 L. Ed. 965; *United States v. Rio Grande Dam & Irr. Co.*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136; *Calumet Grain etc. Co. v. Chicago*, 188 U. S. 431, 23 Sup. Ct. 477, 47 L. Ed. 532. North River is a navigable river of the United States. *Escanaba etc. Transp. Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; 30 Stat. 1149; 28 Stat. 360; 32 Stat.

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370. Plaintiff's right is such a right as will be protected by injunction. *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807. *Carl v. West Aberdeen Land etc. Co.*, 13 Wash. 616, 43 Pac. 890.

W. H. Abel and *H. W. B. Hewen*, for respondent, contended among other things, that the act limits a boom company to such land as is "necessary." Bal. Code, §§ 4378, 4388; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670. An exclusive right will not be presumed. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *The Granite State*, 3 Wall. 310, 18 L. Ed. 179; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 848. Rights against the state must be clearly defined. *Leavenworth etc. R. Co. v. United States*, 92 U. S. 733, 23 L. Ed. 634; *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992; *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214. As there can be no ownership in the corpus of water, the boom company acquires only a license or simple usufruct. *Rigney v. Tacoma Light etc. Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *Atchison v. Peterson*, 20 Wall. 507, 22 L. Ed. 414. To secure a valid appropriation of water there must be a diversion, and application of it, within a reasonable time. *Low v. Rizer*, 25 Ore. 551, 37 Pac. 82; *Nevada Ditch Co. v. Bennett*, 30 Ore. 59, 45 Pac. 472, 60 Am. St. 777; *McDonald v. Bear River etc. Min. Co.*, 13 Cal. 220; *Thomas v. Guiraud*, 6 Colo. 530; *Ft. Morgan Land etc. Co. v. South Platte Ditch Co.*, 18 Colo. 1, 30 Pac. 1032, 36 Am. St. 259; *Offield v. Ish*, 21 Wash. 277, 57 Pac. 809. Diligence is required. *Nevada County v. Kidd*, 37 Cal. 282; *Ophir etc. Silver Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550; *Farmers High Line Canal etc. Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767; *Kelly v. Natoma Water Co.*, 6 Cal. 105. So much as is not applied cannot be regarded as having been appropriated. *McKinney v. Smith*,

21 Cal. 374; *Senior v. Anderson*, 115 Cal. 496; *New Mercer D. Co. v. Armstrong*, 21 Colo. 357, 40 Pac. 989; *Columbia Min. Co. v. Holter*, 1 Mont. 296; *Alder Gulch Con. Min. Co. v. Hayes*, 6 Mont. 31, 9 Pac. 581; *Simmons v. Winters*. 21 Ore. 35, 27 Pac. 7, 28 Am. St. 727; *Hindman v. Rizer* 21 Ore. 112, 27 Pac. 13; *Wheeler v. Northern Colorado Irr. Co.*, 10 Colo. 582, 17 Pac. 487, 3 Am. St. 603; *Butte Canal etc. Co. v. Vaughan*, 11 Cal. 143. The Federal government alone, can complain of any violation of the Federal statutes or assent. *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532; *McKinley Creek Min. Co. v. Alaska United Min. Co.*, 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331. It is frequently necessary in floating logs upon navigable waters to arrest the whole mass of logs for the purpose of segregation. This right, when reasonably exercised, furnishes no ground for complaint. *Nester v. Diamond Match Co.*, 105 Fed. 567; *Watts v. Tittabawassee Boom Co.*, 52 Mich. 203, 17 N. W. 809; *West Branch Boom Co. v. Lumber etc. Co.*, 121 Pa. St. 143, 6 Am. St. 766; *Osborne v. Knife Falls Boom Co.*, 32 Minn. 412, 50 Am. Rep. 590; *Leigh v. Holt*, Fed. Cas. No. 8,220; *Buchanan v. Grand Rapids etc. Log. Co.*, 48 Mich. 364, 12 N. W. 490; *Brown v. Kentfield*, 50 Cal. 129. The prior right gained by a company possessing the right of eminent domain, which arises from the filing of a plat or map of definite location, must be followed within a reasonable time by actual occupation and construction. *Sioux City etc. R. Co. v. Chicago etc. R. Co.*, 27 Fed. 770; *Titusville etc. R. Co. v. Warren*, 12 Phila. 642; *Barre R. Co. v. Montpelier etc. R. Co.*, 61 Vt. 1, 17 Atl. 923, 15 Am. St. 877, 4 L. R. A. 785; *Rochester etc. R. Co. v. New York etc. R. Co.*, 110 N. Y. 128, 17 N. E. 680; *Williamsport etc. R. Co. v. Philadelphia etc. R. Co.*, 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220; *Railway Co. v. Alling*, 99 U. S. 463, 25 L. Ed. 438. The appellant is not entitled to damages on account of the use which respondent has made of that part of North River occupied by its boom. *Lownsdale v. Grays*

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Harbor Boom Co., 21 Wash. 542, 58 Pac. 663; *Lownsdale v. Grays Harbor Boom Co.*, 117 Fed. 983; *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 740, 54 L. R. A. 199.

HADLEY, J.—This is a contest between two boom companies, their booms being located near the mouth of North river, in Pacific county, Washington. The action is in equity, and was commenced by the Nicomen Boom Company for the purpose of restraining the defendant, the North Shore Boom & Driving Company, from constructing a boom upon a portion of the waters of said river, and within the limits of territory included in the plat filed by the plaintiff company, as required by law. Both companies are organized under the laws of this state, which authorize the organization of corporations for the purpose of catching, booming, sorting, rafting, and holding logs, lumber, or other timber products.

In April, 1900, being in due time after the organization of the plaintiff company, it caused to be filed, in the office of the secretary of state of the state of Washington, its plat and survey, showing so much of the shore lines and waters of North river, and lands contiguous thereto, as it proposed to appropriate under the laws of this state. Before beginning the construction of its boom, it submitted to the secretary of war of the United States a plan of its proposed improvements, and a plat of the territory to be occupied thereby, and was, by said war department, granted permission to construct a boom within the limits of said river covered by said plat of location. The territory designated by said plat of location embraces the shores of North river, which river is tributary to Willapa harbor, a bay leading into the Pacific Ocean, and the territory extends from near the mouth of the river, on both sides, for some distance up the stream. The plaintiff thereupon acquired by purchase such upland and shore land, on the left side of said river reckoning down

stream, as was necessary for its use in the premises, and promptly proceeded to erect boom works along the left side of the river, but stopped short of the upper end of the territory covered by its plat of location. The boom was substantially constructed at a cost of about \$16,000; and, from the time of its erection until this controversy arose, it was constantly operated as originally constructed.

While the plaintiff has done some work above, yet its boom has never been completed beyond, its rudder sheer, as originally built. The plaintiff has, however, always expected to extend the boom within the limits of said plat of location, as the demands of business might require, and some weeks before the commencement of this action it had ordered piling for the purpose of extending its boom, as originally constructed, about one thousand feet further up the river. Through some delay, for which plaintiff was not responsible, it did not have this piling upon the ground, and therefore did not commence the actual work of extending the boom until some days after the defendant had commenced to construct its boom, as hereinafter mentioned. It was estimated by the plaintiff that the output of logs on North river, for the season next following, would be largely in excess of the output for the previous year, and that, in such case, the enlargement of its boom would be necessary for the purpose of receiving and handling such increased output.

About this time, in August, 1903, the defendant company was organized, and it, also, filed its plat and survey in the office of the secretary of state, showing so much of the water and shore lines of North river, and land contiguous thereto, as it proposed to appropriate for its boom and driving purposes. It also claims that, before commencing to construct its boom, it secured from the war department of the United States permission to construct within its said location. The plat of location filed by the defendant in the office of the secretary of state covered, substantially, the part of the territory embraced in the plat of the plain-

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tiff lying above the upper end of the sheer boom constructed by plaintiff, as aforesaid. The defendant then proceeded to acquire uplands and tide lands within its plat of location, on the right side of the river, considered necessary for its use in the operation of its proposed boom, such lands being on the bank opposite to the side of the river occupied by the plaintiff's boom as constructed. On September 4, 1903, the defendant began the driving of piles for the construction of its boom, and erected a line of dolphins within the limits of both said plats of location.

Thereupon this action was brought. An emergency restraining order was issued, and afterwards, upon notice, a temporary injunction was granted, pending final hearing of the action. It appears that the indemnity bond required by the court, under the last named injunctive order, was not given by plaintiff, and thereupon the defendant continued with its work of construction. At the time of the trial, the defendant had substantially completed the construction of its proposed boom.

The boom of the defendant is so constructed that logs coming down the river, intended to reach the plaintiff's boom, will necessarily enter the main boom of the defendant. The booms as proposed by the plaintiff and defendant cannot both be constructed. If the boom of the plaintiff should be extended up the river, the passage between its line of dolphins and the dolphins of defendant, on the other side of the stream, would be so narrow as to block navigation. Moreover, it would be impracticable to operate both booms under such circumstances. If the defendant is permitted to operate its boom, as constructed, the boom of plaintiff will receive only such timber from up the river as may escape from the boom of defendant, and such as may be transmitted through that boom to plaintiff.

The foregoing facts are practically undisputed in the case, as we are advised by the record and the findings of the court, and by such exceptions as were taken to the find-

ings. Exceptions were taken to certain findings embodying facts not stated above, and to the refusal to make certain others, and on this appeal errors are assigned thereon. There is, however, no discussion in the brief in reference to these claims of error, and no particular evidence is pointed out in support thereof. We therefore believe we have substantially stated the controlling facts, and that they may be treated as undisputed. After an extended trial, and the consideration of much evidence, the court entered judgment denying the plaintiff's application for an injunction, and dismissing the action. This appeal is from that judgment. For reasons hereinbefore stated, we shall not discuss such errors as have been assigned in relation to the court's findings of facts, but shall confine ourselves to the matters discussed in the briefs, all of which involve the correctness of the conclusions of law and the judgment thereon.

Boom companies in this state are quasi-public corporations, having the power of eminent domain, required by law to file a map of location, and to perform booming services for all persons requesting the same. See, Bal. Code, §§ 4378-4394. The provisions embodied within the above cited sections comprise the substance of two acts of the legislature passed, respectively, in the years 1890 and 1895. Section 4379 contains the following:

"Any corporation hereafter organized for the purpose mentioned in the last preceding section of this chapter shall, within ninety days after its articles of incorporation have been filed, proceed to file in the office of the secretary of state a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto as are proposed to be appropriated for said purpose by said corporation."

Appellant complied with the above, and built a boom covering a portion of the territory sufficient to meet the then demands, so far as appears. It becomes necessary to determine the extent of its rights in the remaining territory.

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It is respondent's position that appellant has lost its rights in the located territory within which it has not actually constructed boom works. In suggesting to this court the principles which appellant claims should be applied in the premises, it argues that an analogy exists between the rights acquired under the filing of location plats by boom companies, in this state, and those arising from the filing of similar plats by railroad companies.

We have been referred to authorities which consider the rights of railroad companies with reference to their location plats, and these authorities we have examined. Under legislative schemes for the location of railroad lines which are initiated by the filing of plats of location, it is held that compliance with the law in that particular secures to the locating company the right to construct and operate a railroad upon such line, exclusive, in that respect, as to all other railroad corporations, and free from the interference of any party. The right to locate its line of road in the place of its selection is delegated to the corporation by the sovereign power. The further right to subsequently acquire, *in invitum*, the right of way and necessary lands for operation of the road from the land owners is likewise delegated. The source of the franchise is in the sovereign power, which power confers the franchise upon the corporation as its delegated representative, and the grant is for public, and not for private, purposes. It is held that, inasmuch as public considerations enter into the grant of the franchise, public policy therefore favors it for the public convenience and use, and that a railroad company, by the filing of its plat of location, and by reason of the notice thereof, impresses upon the lands a right in the nature of a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings. It is further held that, when a franchise has been thus conferred, no other railroad company may acquire title to the lands within such a location, or construct a road thereon, to the exclusion of the right of the first locating

company to acquire such title *in invitum*, and to construct its road upon the lands. Injunction has also been adopted as the proper remedy to prevent such interference. In support of the above propositions, which we have stated generally, we cite the following authorities: *Rochester etc. R. Co. v. New York etc. R. Co.*, 110 N. Y. 128, 17 N. E. 680; *Barre R. Co. v. Granite R. Co.*, 61 Vt. 1, 17 Atl. 923, 15 Am. St. 877, 4 L. R. A. 785; *Sioux City etc. R. Co. v. Chicago etc. R. Co.*, 27 Fed. 770; *Morris etc. R. Co. v. Blair*, 9 N. J. Eq. 635; *Titusville etc. R. Co. v. Warren etc. R. Co.*, 12 Phila. 642; *Williamsport etc. R. Co. v. Philadelphia etc. R. Co.*, 141 Pa. St. 407, 21 Atl. 645, 12 L. R. A. 220; *Railway Co. v. Alling*, 99 U. S. 463.

Respondent argues that the suggested analogy between railroad companies, and boom companies as organized under the laws of this state, is not well taken, and it therefore urges that search must be made for some other line of authorities in order to find an analogy applicable to the questions in this case. It cites and discusses cases relating to the diversion and appropriation of water for mining, milling, irrigation, and manufacturing purposes. We are not impressed with the force of the analogy suggested by respondent. The appropriation of water for the purposes mentioned is ordinarily for private use, and not to serve the public generally. The appropriator is permitted to take as much water as he can reasonably use to supply his own private property. It is held that he must proceed with reasonable diligence to determine how much he requires, and not deprive others of the use of water which he does not require. He is not compelled to serve the public in any respect, and the amount of water he may appropriate for his necessary purposes does not depend upon the public. The primary object in granting charters to railroad companies is that they shall serve the public, and the right of eminent domain to secure right of way and necessary grounds is given to them in order to aid such public purpose. The same is true of boom companies

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under the statutes of this state. Both are strictly public service corporations, and are required by law to serve the public in their respective spheres of operation. That the legislature intended that an analogy shall exist between the two classes of corporations may be inferred from the boom statute itself. Bal. Code, § 4378, which confers the power of appropriation of lands upon boom companies, provides as follows:

“If such corporation shall not be able to agree with persons owning land, shore rights, or other property sought to be appropriated, as to the amount of compensation to be paid therefor, the compensation therefor may be assessed and determined and the appropriation made in the manner provided by law for the appropriation of private property by railways:”

It will thus be seen that the method provided for appropriating private property by railroad companies is specifically adopted as the method for boom companies. Respondent argues, however, that the rights acquired by boom company locations are not similar to those acquired by railroad companies, in that it claims that the rights of the latter are corporeal in their nature, while those of the former relate to water, and therefore constitute a mere license or usufruct, incorporeal in its nature.

The state, however, has dominion over both the land and the water. The legislative scheme for boom companies requires that the land owner shall permit his land to be subjected to the use of such companies, upon receiving compensation therefor, and the title is thus acquired. It is true, the state does not pass title to the beds and waters of its streams; but, as an accompaniment of the right to condemn adjacent lands, it has directly conferred upon boom companies the right to locate and operate booms in such waters. As a part of the location plan, the plat and survey shall designate not only the lands, but the waters, desired to be used. The plat when filed becomes notice to the world

of the appropriated territory, and while the state requires the upland owner to submit to the use of his lands, it also confers, directly upon the locator, the right of dominion over the water in aid of the other use. In considering these location rights, we therefore see no reason for making a distinction between those acquired upon land and those acquired in the waters. The state has not only authorized both, but they are combined rights, having in view a common end, and neither would be useful for accomplishment of that end without the aid of the other. We therefore think the analogy suggested by appellant is forceful, and that the railroad cases cited are useful in aiding us to determine the principles applicable here.

Applying the rule followed in the railroad cases, appellant had the right, after filing its plat of location, to acquire the title to the lands within the limits of its location. It was an absolute right which it could enforce by condemnation proceedings to the exclusion of any other boom company that might seek to appropriate the same land. It did acquire these lands, not by condemnation, but by purchase. Having thus established its location and acquired the necessary lands, it proceeded to construct its boom, but did not construct it throughout the entire located territory, although it has always intended to do so, as the public demand might require. We think, in reason, that the appellant had the right, when it filed its plat of location, and acquired property for the purpose of constructing its boom, to take into consideration the future requirements of its business, and that it should not be restricted merely to the territory required at the time its first works were erected. It would seem that this must be so, in view of the obligations appellant assumed as a public service corporation. The statute requires that it shall catch, hold, and assort the logs and timber products of *all* persons requesting such service. Bal. Code, § 4381. Boom companies are also made liable for loss or damages resulting from neglect, carelessness, or un-

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necessary delay. Bal. Code, § 4384. If a boom company could not take into consideration the future development and growth of the timber industry in making its location, it would become greatly embarrassed in performing the services for the public required of it by law. Moreover, if, in order to anticipate and provide for such development, it can hold its location selected for that purpose only by constructing its boom throughout its entire selected territory, then it is necessary to so construct in the beginning, and the expenditure of large sums of money might thus be required long in advance of any necessity for it in aid of the public service.

In the case at bar, the sum of \$16,000 was expended in the beginning, which seems to have met the demands of that time. The construction throughout the located territory would have required the expenditure of a much larger sum of money, without any present necessity for it, and would have exposed the additional constructed material to the action of the water and elements, and to consequent deterioration and decay, long before it would have been needed for the service of the public. That a boom company must have a discretion in locating its works, and in determining the extent of necessary territory for its purposes, is recognized in *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670. It is also held that the question of future needs of railroad companies, in fulfilling their charter purposes and performing their public duties as common carriers, is one which should be given full consideration by a court before it undertakes to deprive a company of any part of its right of way in favor of another corporation. Such companies may anticipate future necessities and may, for that purpose, hold territory not in actual use to the exclusion of other companies. *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 120 Fed. 362; *In re Staten Island Rapid Transit Co.*, 103 N. Y. 251, 8 N. E. 548; *Pittsburgh etc. R. Co. v. Peet*, 152 Pa. St. 488, 25 Atl. 612, 19 L. R. A.

467; *Appeal of Pittsburgh Junction R. Co.*, 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. 128.

Having thus acquired the first right to construct a boom within its located territory, and having, also, the right to anticipate future needs of the service it had undertaken for the public, what rights, if any, does appellant have in the remaining territory above its boom, as now constructed? It is evident that appellant never intended to abandon any part of its located territory. The court finds that it intended to extend its construction over this territory as necessity required. If there was an abandonment, it must have been by virtue of non-use of the territory, in the way of failure to extend and operate the boom thereon. However, in the absence of legislative provision to that effect, mere non-user does not of itself constitute an abandonment. It is held that, without such legislative provision, courts are not justified in fixing a limit at which mere failure to construct shall be held to be an abandonment. Abandonment is a question of intent, and while such intent may be found as a fact from long non-use, yet the non-use itself does not constitute an abandonment, and does not of itself defeat or impair acquired rights. 3 Elliott, Railroads, § 931; *Townsend v. Michigan Cent. R. Co.*, 101 Fed. 757; *Roanoke Inv. Co. v. Kansas City etc. R. Co.*, 108 Mo. 50, 17 S. W. 1000; *Perth Amboy Terra Cotta Co. v. Ryan*, 68 N. J. L. 474, 53 Atl. 699; *Denison etc. R. Co. v. St. Louis etc. R. Co.*, 96 Tex. 233, 72 S. W. 161, 201; *Welsh v. Taylor*, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535; *Durfee v. Peoria etc. R. Co.*, 140 Ill. 435, 30 N. E. 686; *Barlow v. Chicago etc. R. Co.*, 29 Iowa 276; *Memphis etc. R. Co. v. Humphreys*, 65 Ark. 631, 48 S. W. 86; *Eddy v. Chace*, 140 Mass. 471, 5 N. E. 306; *Johnston v. Hyde*, 33 N. J. Eq. 632.

Appellant has not, therefore, abandoned its location by mere non-use. If it has forfeited its rights therein, it must be due to the operation of law for some further reason. Respondent insists that appellant did not proceed with dili-

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gence to construct its extended boom. Lack of proper diligence is an element to consider in determining whether there has been an actual abandonment. The court's finding, however, shows that the intention to extend the boom as the public service required always existed, and in the absence of a showing that diligence to meet that end was not exercised, we think there was not an abandonment. It is true, as respondent says, the cases hereinbefore cited recognize the necessity for diligence in order to hold location rights. In some of the cases a much longer, and in some a much shorter, time elapsed than in the case at bar. What is diligence in any given case must depend upon the particular circumstances. The relation that the delay may bear to the proper past discharge of the locator's duties to the public, as well as the necessity for future needs in the discharge of those duties, should be taken into consideration. Viewed from that standpoint, for reasons already stated, we think there was not an abandonment for mere lack of diligence.

Respondent further contends that there has been a forfeiture by reason of the provision of the boom statute. Bal. Code, § 4378, contains the following:

"Provided, That any property acquired under the provisions of this chapter by the exercise of the right of eminent domain shall be used exclusively for the purposes of this chapter, and whenever the use of said property as herein contemplated shall cease for a period of one year, the same shall revert to the original owner, his heirs or assigns, upon the repayment of the original cost of same."

The above is from the statute of 1890. A similar provision was included in the statute of 1895, and is found in Bal. Code, § 4388. It will be observed that the reversion declared by the statute is of lands which have been acquired by eminent domain, and it is evidently for the benefit of the land owner who has involuntarily yielded his land for a specific purpose. The provision does not extend to any further rights than those acquired by eminent domain.

Appellant acquired no lands within its location in that manner, but all were acquired by purchase. Moreover the provision applies to lands, the use of which shall "cease" for a period of one year. We think the intention of the statute is to require that when lands, which have been actually used for booming purposes, have not thereafter been used for such purposes for the period of one year, there shall be a reversion. The reason for the provision seems to be that, if the land has once been applied to the intended use, and that use then ceases for a year, it shall be presumed that the necessity for its use no longer exists, and the land owner shall then be entitled to re-enter and occupy it. We do not think the statute applies to lands located with reference to future needs, the actual necessity for the use of which has not yet arisen, but which necessity may reasonably be anticipated.

"The statute provides that, when such school house as is required of the town or district 'has ceased' to be thereon for two years, the lot may revert to the owner. Here the house has not ceased to be, nor begun to be, thereon. There must be the beginning before the end. This provision was intended to apply to an occupancy once had and abandoned." *Jordan v. Haskell*, 63 Me. 189.

Appellant further urges that, in any event, it is not within the province of respondent to ask a forfeiture, for the reason that the rights of appellant result from a compact or agreement between it and the state, and that inquiry into the question of forfeiture can only be made by the state, and that, too, in a direct proceeding in the nature of *quo warranto* instituted for that purpose. That is both an interesting and important question, but, in view of what we have already said in reference to the merits of the question of forfeiture in this case, it is unnecessary to pass upon the proposition as to who may ask a forfeiture. The necessary limits of this opinion are already extended, and we are therefore unwilling to pass upon this question now unless it were a necessary

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factor in the disposal of the case. Appellant further urges that the record shows that the respondent's boom and location are not lawful, in that no sufficient permit has been granted to it by the war department of the United States. For reasons above stated, it is unnecessary that we shall examine that question.

Respondent argues that, if appellant is permitted to hold its location to the exclusion of the former from said territory, it will virtually place appellant in control of a monopoly of the booming business upon North river. What may be the practical effect in that particular is not here for our consideration. We are simply called upon to determine appellant's rights under its location, as accorded to it by the state. The legislature has wisely provided to prevent an oppressive monopoly as against the public by limiting the maximum charge that may be made by a boom company to seventy-five cents per thousand feet. Bal. Code, § 4381. The record shows that appellant has never charged as much as the maximum rate. Still the legislature, without doubt, contemplated that competition may exist where topographical and geographical conditions will admit thereof, and where prior locators, who have in good faith become established, may at the same time be protected in their locations.

It is said that the boom statutes contemplate that more than one boom may exist upon the same river. That is true, and thereby the legislature has made clear that it did not intend to authorize an unconstitutional monopoly of a stream. If, however, the available booming extent of a stream be such as to reasonably prevent the operation of more than one boom, the effect of a single location cannot well be avoided. Such circumstances would not make a monopoly authorized by law as such, but the location would become the only one upon the stream by mere force of necessity. In any event, whatever may be the available booming extent of a stream, the legislature undoubtedly intended that those who in good faith venture to spend their money

and become established as pioneers upon a stream shall be protected in the rights accorded them by virtue of their compliance with the location statute. It must have intended that, in the consideration of these rights, reference must be had to enlarged commercial necessities and to consequent future demands for public service. If the available extent of a river be such as to reasonably permit the operations of more than one boom company thereon, each will be protected in its location lawfully acquired, but prior rights must be protected. It is possible for a booming company, in an effort to hold an entire stream, to spread its plat of location over the whole available booming space thereon. If such were the manifest or apparent purpose, without regard to reasonable present and future necessities, it would be an attempted fraud against the state and the public which could not be upheld. Such a purpose does not appear on the part of appellant. Sufficient good faith appears to warrant its being protected in its location. The court finds that appellant's contemplated extension cannot be made and operated by reason of respondent's boom. The two cannot exist together. It follows that respondent is unwarrantedly interfering with appellant's location, and that in its booming operations the former must be restricted to territory outside of the latter's location.

We think the court erred in its conclusions of law. The judgment is therefore reversed, and the cause remanded, with instructions to make conclusions of law and enter judgment in accordance with what has been herein said.

MOUNT, C. J., ROOT, CROW, DUNBAR, and RUDKIN, JJ., concur.

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[No. 5480. Decided September 20, 1905.]

THOMAS CARSTENS, *Appellant*, v. GEORGE MILO,
Respondent.¹

ATTACHMENT — DEBT NOT DUE — PLEADINGS — COMPLAINT — DEMURRER — FAILURE TO ALLEGE FRAUDULENT DISPOSITION OF PROPERTY. Upon attachment for a debt not due, permitted by Bal. Code, § 5352, in certain cases, the complaint is demurrable, where it fails to allege a fraudulent disposition of the defendant's property, as required by said statute, and it is not aided by the statements of the affidavit for attachment.

SAME—QUASHING WRIT—RIGHT TO AMEND COMPLAINT—FAILURE TO OFFER AMENDMENT. The dismissal of an action, upon sustaining a demurrer to the complaint and quashing a writ of attachment for defects in the complaint, cannot be urged as error where plaintiffs made no application to amend the defects, as authorized by Bal. Code, § 5380.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 4, 1904, upon sustaining a demurrer to a complaint and quashing a writ of attachment, dismissing an action upon open account. Affirmed.

Kerr & McCord, for appellant.

Wooten & Welch, for respondent.

DUNBAR, J.—This was an action brought by appellant to recover on an open account for meat sold by appellant to respondent, and inasmuch as the case went off on demurrer to the complaint and affidavit in support of an attachment in the case, we will set them forth in substance here. The complaint, leaving out the formal parts, was as follows:

"(1) That the plaintiff, at the special instance and request of the defendant, sold and delivered to defendant merchandise at the price and value of \$333.39; that the said merchandise was sold to defendant on and between the 20th day of March and the 31st day of March, 1904.

¹Reported in 82 Pac. 410.

"(2) That no part of said sum has been paid except the sum of \$2.10, leaving a balance of \$331.29, which the defendant owes to the above named plaintiff, and that nothing but time is wanting to fix an absolute indebtedness in the sum of \$331.29."

The affidavit is as follows:

"C. M. Maxwell being first duly sworn on oath deposes and says, that the defendant named in the above entitled action, George Milo, is justly indebted to the plaintiff above named in the sum of \$331.29, over and above all just credits and offsets; that the defendant above named has converted a part of his property into money for the purpose of placing it beyond the reach of his creditors, and is about to assign, secrete, and dispose of the balance of his property with the intent to delay, defraud and hinder his creditors, and that this attachment is not sought, and the above entitled action is not prosecuted, to hinder, delay, or defraud any creditors of the defendant; that nothing but time is wanting to fix an absolute indebtedness owing by the said George Milo to the plaintiff above named."

The defendant, respondent here, demurred to this complaint, and moved the court to quash and vacate the writ of attachment and garnishment for the reasons, that the complaint stated no facts authorizing the issuance of said writs, but does show on its face that this action and said writs were prematurely sued out and issued; that the affidavits in support of said writs contained no facts authorizing the issuance of the same, and do not change the complaint in the material facts necessary to authorize said writs; that the facts stated in the complaint in no way relate to or authorize said writs of attachment and garnishment. The defendant then denied the allegations of the affidavit and filed counter affidavits. Afterwards on the 2d day of May, 1904, the following order was made:

"On this day coming regularly to be heard the above entitled cause upon the demurrer of the defendant to the complaint herein, and his motion to quash, vacate and discharge the writs of attachment and garnishment hereinbefore issued

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and served upon defendant and his property, and both plaintiff and defendant appearing by their attorney of record, and said demurrer and motions being fully presented to the court with accompanying affidavits and counter affidavits, and the court being fully advised as to the facts and having fully heard and considered the law of the case and the argument of counsel thereon, the court is of the opinion that the law of said demurrer and motion is with the defendant."

The judgment followed, dissolving the attachment and garnishment and dismissing the action. The order of the court seems to be somewhat mixed, inasmuch as it embraces both the law and the facts of the case, but we think a fair construction of it will warrant its treatment as a ruling on demurrer and motion to quash. It is the contention of the appellant that the court erred in sustaining the demurrer to the complaint and that the complaint was good, the argument of the respondent being that the complaint was faulty because it contained no allegation attempting to explain or show why the action was brought in advance of the maturity of the alleged indebtedness, and that the allegations of the affidavit cannot aid the complaint in this particular. It is evident that this complaint, if no writ of attachment had been asked for, would have been obnoxious to a demurrer. The only reason why a complaint can be sustained in advance of the maturity of the debt upon which the complaint is sued out, is the reason furnished by the statute, viz., to preserve the fruits of the judgment which may be obtained after the maturity of the debt. Bal. Code, § 5352, provides:

"An action may be commenced and the property of a debtor may be attached previous to the time when the debt becomes due, when nothing but time is wanting to fix an absolute indebtedness, and when the affidavit, in addition to that fact, states, (1) That the defendant is about to dispose of his property with intent to defraud his creditors; . . ."

It will be observed that not all of the reasons for granting an attachment when a debt becomes due warrant the issuance

of an attachment where the debt is not yet due; and the statute seems to contemplate that the complaint must show the reasons existing for the action before the action can be maintained. It is no doubt true that, in the ordinary case of attachment where the debt sued upon is matured, the causes for which the attachment issues are not necessarily set out in the complaint, because in such a case an attachment may or may not be asked for. The primary object in a case of that kind is the obtaining of the judgment. But where the debt is not yet due, the primary object in bringing the suit is not to obtain a judgment which the plaintiff is not entitled to by reason of the debt not yet being due, but to secure a lien on the debtor's property which may be made to respond to the judgment when it can be rightfully obtained.

But, outside of any original reasoning on this proposition, this court held, in *Cox v. Dawson*, 2 Wash. 381, 26 Pac. 973, that, under the statute allowing attachment on claims not yet due when the debtor is fraudulently disposing of his property, the plaintiff must allege such fraudulent disposition in his complaint, and in case of denial, prove the same upon the trial in order to authorize a judgment in his favor, the court in that case saying:

"The act referred to [being the act which we have quoted] does not confer upon a creditor any new right of action, when it permits an attachment to secure an undue claim. Its effect is to make it the law of all contracts for future payment that, in case of conduct on the part of the debtor such as would tend to fraudulently jeopardize the safety of the debt, the creditor may commence his suit forthwith, and have an attachment as security *pendente lite*. By the first section of the act, attachments are issued only at the time of the commencement of the action, or afterwards. An action is commenced by the filing of a complaint and the issuance of a summons. Laws 1887-8, page 24. In such cases, therefore, the attachment must be preceded by the filing of the complaint. But unless the complaint shows the reason for

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its premature filing, it would be obnoxious to demurrer for want of facts. Therefore, the allegations in the affidavit for the attachment are necessary to the complaint also, and they continue to be material allegations at every stage of the case. They must be proved like any other fact to authorize judgment, as, unless they were true at the time the action was commenced, there was no jurisdiction for the premature suit and attachment, and the proceeding must fail."

We think the court did not err in sustaining the demurrer to the complaint, and the complaint failing, of course the writ of attachment was properly dissolved.

It is contended, however, that, under the liberal provisions of Bal. Code, § 5380—which is to the effect that the chapter on attachments shall be liberally construed, and that plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the complaint, affidavit, bond, writ, or other proceeding, and that no attachment shall be quashed or dismissed or the property attached released, if the defect in any of the proceedings has been or can be amended so as to show that a legal cause for the attachment existed at the time it was issued, and the court shall give the plaintiff a reasonable time to perfect such defective proceedings—the court erred in not allowing the plaintiff to amend his complaint. It is stated in the brief of appellant that, notwithstanding the argument and protest of appellant, the court failed and refused to allow and fix a reasonable time for appellant to cure any defect by amendments as provided in the foregoing section. If this statement were borne out by the record, it would undoubtedly have been error on the part of the court to have dismissed the action. But an examination of the record in this case fails to show any application or motion of any kind on the part of the appellant to amend his pleadings, and the statute must be construed, of course, with reference to an application to amend. There having been no amendments offered, this

court must presume that the appellant stood on its pleadings as they were originally filed.

No error appearing, the judgment will be affirmed.

MOUNT, C. J., ROOT, FULLERTON, HADLEY, CROW, and RUDKIN, JJ., concur.

[No. 5630. Decided September 30, 1905.]

CLARENCE H. CHILDS, *as Receiver, etc., et al.*, Appellants,
v. ALDEN J. BLETHEN, *Respondent*.¹

CORPORATIONS—INSOLVENCY—RECEIVERS—JUDGMENT AGAINST STOCKHOLDERS—RIGHTS OF CREDITORS NAMED IN JUDGMENT. A judgment in the receivership of an insolvent corporation, entered against the stockholders, in which proceedings the creditors interpleaded, is a judgment in favor of the creditors, where the language clearly and explicitly gives the creditors named a judgment against the stockholders in sums specified, and directed to be paid to the creditors in proportion to the amount due each, although the receiver is directed and authorized to collect the amount; hence the creditors are proper parties plaintiff to an action on the judgment.

SAME—FINALITY OF JUDGMENT. A judgment against the stockholders of an insolvent corporation is a final judgment, where the amount due was definitely determined, and collection directed by execution or suit as may be necessary, although no costs are specified.

SAME—RECEIVER TO COLLECT JUDGMENT—PARTY TO SUIT. A receiver of an insolvent corporation who is directed by a judgment in favor of the creditors to collect and enforce the same against the stockholders, is a proper party plaintiff in an action upon the judgment, although he may not be a necessary party and is not beneficially interested.

SAME—FOREIGN JUDGMENT AGAINST STOCKHOLDERS—ENFORCEMENT IN ANOTHER STATE. Where, in a receivership proceeding in Minnesota, all the creditors of the insolvent corporation unite and recover judgment against the stockholders on personal service in that state, they may, together with the receiver, enforce the judgment by an action in this state, against a stockholder who has since removed to this state.

¹Reported in 82 Pac. 405.

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SAME—JUDGMENTS—JOINT OR SEVERAL. A judgment against several stockholders in favor of the creditors of an insolvent corporation is not a joint judgment where it appears upon its face to be against each stockholder in a certain sum.

JUDGMENTS—ACTION AGAINST ONE JOINT DEBTOR. An action upon a joint judgment may be maintained against one of the joint debtors alone.

CORPORATIONS—RECEIVERS—STOCKHOLDERS—INTERLOCUTORY DECREE—EFFECT—LIMITATIONS. The fact that in a receivership proceeding, an interlocutory judgment was rendered against stockholders of an insolvent corporation, determining who were stockholders and retaining jurisdiction for the purpose of entering judgment, would not deprive the court of jurisdiction to enter a personal judgment, nor would the lapse of six years between the dates of such judgments vacate the jurisdiction of the court.

LIMITATION OF ACTIONS—FOREIGN JUDGMENT. An action upon the judgment of the state of Minnesota entered in 1903 is not barred by the statute of limitations in this state in the year 1905.

Appeal from a judgment of the superior court for King county, Morris, J., entered November 19, 1904, dismissing an action upon a foreign judgment, upon sustaining a demurrer to the complaint. Reversed.

Shank & Smith, for appellants.

Bausman & Kelleher, for respondent.

MOUNT, C. J.—This action is based upon a judgment recovered in the state of Minnesota. The court below sustained a demurrer to the amended complaint. The plaintiffs elected to stand upon the allegations of the complaint, and the action was dismissed. Plaintiffs appeal.

The amended complaint, omitting the title of the court, is as follows:

“Amended Complaint.

“Clarence H. Childs, as receiver for the collection and enforcement of the judgment against the defendant Alden J. Blethen . . . [then follow the names of one hundred other plaintiffs] Plaintiffs, v. Alden J. Blethen, Defendant.

"Come now the plaintiffs herein, by their attorneys, Shank & Smith, and for an amended complaint allege:

"(1) That at all times hereinafter mentioned the district court in and for the county of Hennepin, and of the Fourth Judicial District of the state of Minnesota, was and is a court of general jurisdiction, duly created and organized under the laws of said state.

"(2) That the plaintiff Clarence H. Childs is the receiver duly and regularly appointed by the said district court of Hennepin county, for the purpose of enforcing and collecting the judgment hereinafter mentioned against Alden J. Blethen. That the remaining plaintiffs are judgment creditors of the said Alden J. Blethen, each for the amount set opposite his name, as shown by the list to Exhibit 1, hereinafter referred to; which judgment, for the aggregate amount of \$37,888.96, recovered on July 2, 1903, is the judgment for the enforcing of which this action is brought.

"(3) That in December, 1891, the Bank of New England was organized under and by virtue of the laws of the state of Minnesota, as a bank of discount and deposit, and that the defendant Alden J. Blethen was the promoter thereof and its president, manager, and principal stockholder during all of its existence. That on July 3, 1893, the said bank being then insolvent, a receiver in insolvency was duly appointed thereof by the said district court of Hennepin county, who thereupon took charge of the property and assets of the said bank and administered the same under the direction of the court, and was thereafter discharged.

"(4) That on December 26, 1895, while the receivership proceedings mentioned in paragraph 3 hereof were still pending, and before the discharge of the said receiver, the said district court of Hennepin county, Minnesota, duly made its order authorizing one of the creditors of the said bank to intervene in said receivership proceedings on behalf of the creditors of such bank and implead the stockholders thereof as parties defendant in said action, for the purpose of enforcing their statutory liability to the creditors of said bank; all in accordance with the law of the state of Minnesota and the practice of the said district court of Hennepin county. That pursuant to the said order made at the application of said intervening creditor, stockholders of the said bank were duly and regularly impleaded, and duly and regu-

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larly served with process therein, and that pursuant to the orders of the court the creditors of the said bank duly and regularly filed their claims in said suit in intervention and became parties to the said action.

“(5) That pursuant to the said order so made as aforesaid permitting the said intervention and directing the impleading of the stockholders, the summons of the said district court in said action, together with the complaint therein, was duly and regularly served upon all of the stockholders of the said bank, including the defendant herein, Alden J. Blethen, who at the time of the making of the order authorizing the impleading of the stockholders as aforesaid were or since have been residents of said state, and the said Alden J. Blethen was at the time of the service of the said summons and complaint within the jurisdiction of the said court. That the said district court, ever since the service of the said summons and complaint upon said defendants in said action as aforesaid, including the defendant Alden J. Blethen, had full and complete jurisdiction of said stockholders, defendants therein, including the defendant herein, Alden J. Blethen, for the purposes thereof, and has had full and complete jurisdiction of the subject of the action as well.

“(6) That on July 9, 1897, an interlocutory adjudication was made in said court in favor of the plaintiffs herein, determining them to be creditors of the said Bank of New England, and also determining who were the stockholders in the said bank, and the amount for which they were found liable, and the amount for which each was found liable, including this defendant, Alden J. Blethen, and providing for the enforcement of such liability against the stockholders in said action, and retaining jurisdiction for the purpose of making such further orders, decrees and directions as might be necessary for the full enforcement thereof.

“(7) That on July 2, 1903, pursuant to the reservations in the said interlocutory adjudication contained, and with proper reference thereto, and upon the petition of Clarence H. Childs, receiver as aforesaid, the said district court entered its final judgment in said action against the defendant herein, Alden J. Blethen, in the sum of \$37,888.96, a copy of which said judgment is hereto attached,

marked Exhibit 1, and is hereby referred to and made a part of this complaint.

"(8) That no part of said judgment has been paid, and that there is now due and owing the plaintiffs herein, according to the terms thereof, the sum of \$37,888.96, together with interest thereon at the rate of six per cent per annum from July 2, 1903.

"Wherefore plaintiffs demand judgment against the defendant Alden J. Blethen in the sum of \$37,888.96, with interest thereon from July 2, 1903, together with their costs and disbursements herein. [Duly verified.]

"Exhibit 1 (to the complaint).

"State of Minnesota, County of Hennepin, District Court, Fourth Judicial District.

"State of Minnesota, Plaintiff, v. Bank of New England, Defendant, J. A. Hanson, Intervener, John R. Rea, Alden J. Blethen, Charles F. Haney, Kristian Kortgaard, Charles R. Chute, *et al.*, Impleaded.

"This matter coming on before this court on the motion of C. H. Childs, as receiver, for the enforcement and collection of the interlocutory decree herein; and the court having heard the evidence in support of said petition, did, on the 2d day of July, 1903, make and file its findings of fact and conclusions of law and order for final judgment against these particular defendants in said cause.

"Now, pursuant to said order, and on motion of C. H. Childs, as receiver, etc., it is hereby adjudged and decreed as follows:

"(1) That there is now due the creditors of the Bank of New England, a list of which is hereto attached marked 'Exhibit A,' the sum of \$81,248.77, and that the said creditors are entitled to recover from the stockholders of said bank, as hereinafter set forth.

"(2) That the said amount, or so much thereof as may be collected from the defendants hereinafter named, shall be distributed among the creditors of said bank in proportion to the amount set opposite their names in said Exhibit 'A.'

"(3) That the liability of the stockholders of the said Bank of New England who resided within this state at the time of the institution of said action, or who have resided

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within said state since the institution of said action, has been enforced and collected in full so far as may be, except that of the defendant Lucien Swift for the sum of \$2,000, and said liability of \$2,000 is treated as having been paid in full, and the amount due the creditors, as above stated, has been reduced accordingly.

"(4) That the defendants Alden J. Blethen, Charles R. Chute, Kristian Kortgaard and Charles F. Haney, have been, ever since the entry of the said interlocutory decree herein, absent from the state of Minnesota, and beyond the jurisdiction of this court, and have had no property within said state from which their liability as stockholders herein could be paid or satisfied in full or in part, and neither they, or any of them, have ever paid or cancelled any part of their liability as such stockholders.

"(5) That there is now due from each of said stockholders to the creditors of said Bank of New England, a list of which is hereto attached marked Exhibit 'A,' the sum set opposite the name of each of the following defendants respectively, viz.: Alden J. Blethen, \$37,888.96; Charles F. Haney, \$139.10; Kristian Kortgaard, \$695.50; Charles R. Chute, \$139.10.

"(6) That when said sums are paid and satisfied in full, together with interest thereon at the rate of 6 per cent per annum from the date hereof, the liability of the said respective parties to the creditors of said bank, and to other stockholders of said bank, will be paid and satisfied in full. The receiver herein is directed to satisfy in full the liability of said parties upon the payment to him of said amount.

"(7) That Clarence H. Childs, heretofore appointed by interlocutory decree herein as receiver, for the purpose of collecting and enforcing the respective liabilities of the stockholders of said Bank of New England, who were found liable in said decree, is likewise directed, authorized and empowered to proceed to the collection and enforcement of the amount found due from the defendant stockholders herein, and to that end is authorized, directed and empowered to cause executions to be issued for the full amount of the respective liability of these defendants as found herein, and to institute and maintain such suits either at law or in equity, as may be necessary to the enforcement or preservation of the liability of said defendants, either within this jurisdiction,

or within any other jurisdiction wherein service of process upon said respective defendants may be obtained.

"Dated July 2, 1903. By the court."

Exhibit A, attached to the original judgment, consists of a list of the names of all the plaintiffs, except plaintiff Childs, as receiver, with the amount due set opposite each name, the total amount aggregating \$81,248.77. To this complaint the respondent demurred upon the grounds:

"(1) That the court has no jurisdiction of the person of the defendant or of the subject-matter of the action. (2) That the plaintiffs have not, nor has any of them, legal capacity to sue. (3) That there is a defect of parties plaintiff. (4) That there is a defect of parties defendant. (5) That the amended complaint does not state facts sufficient to constitute a cause of action. (6) That the action has not been commenced within the time limited by law. (7) That several causes of action have been improperly united."

To support this demurrer the respondent argues, (1) that the creditors cannot sue outside of the state of Minnesota, because they have no judgment of their own, and that being so, no action can now be maintained in this state; (2) that the receiver cannot sue outside of the state of Minnesota, because the judgment is not a final judgment in his favor, and if it were, it cannot be enforced outside of that state by the receiver; (3) that the defendant cannot be sued separately, because the judgment is a joint judgment; (4) that there was no jurisdiction in the Minnesota court to enter the order sued upon without further notice to defendant; (5) that the action is barred by the statute of limitations. All the points which respondent seeks to make against the complaint require a consideration of the judgment sued upon.

There can be no doubt that the judgment is one in favor of the creditors. The language is:

"It is hereby adjudged and decreed as follows:

"(1) That there is now due to the creditors of the Bank of New England, a list of which is hereto attached marked

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Exhibit 'A,' the sum of \$81,248.77, and that said creditors are entitled to recover from the stockholders of said bank, as hereinafter set forth.

"(2) That the said amount, or so much thereof as may be collected from the defendants hereinafter named, shall be distributed among the creditors of said bank in proportion to the amount set opposite their names in said Exhibit 'A.' . . .

"(5) That there is now due from each of said stockholders to the creditors of said Bank of New England, a list of whom is hereto attached marked Exhibit 'A,' the sum set opposite the name of each of the following defendants respectively, viz.: Alden J. Blethen, \$37,888.96; Charles F. Haney, \$139.10; Kristian Kortgaard, \$695.50; Charles R. Chute, \$139.10."

This language clearly and explicitly gives the creditors named a judgment against the defendant Blethen for the sum of of \$37,888.96, which sum is required by paragraph 2 to be paid to such creditors in proportion to the respective amounts set opposite their names in Exhibit A. When paid, together with interest at six per cent per annum, the liability of the defendant Blethen to the creditors of the bank and to other stockholders ceases, as provided in paragraph 6. It is true that, by paragraph 7, Clarence H. Childs is directed and authorized to collect the amount due from defendant by execution, or by suit, as may be necessary, but this provision does not make the judgment any less the judgment of the creditors. It is still their judgment and they are entitled to the proceeds thereof. They are the parties beneficially interested. Childs is interested merely as receiver or assignee for the purpose of collection. That the judgment sued upon is a judgment against the defendant, and in favor of the creditors who were made parties plaintiff in this action, is so plain as to need no further discussion and no citation of authority.

Respondent next argues that the receiver cannot sue outside of the state of Minnesota, because the judgment is not

a final judgment in his favor; and even if it is such final judgment, it cannot be enforced outside of Minnesota by the receiver. The judgment upon its face appears to be a final judgment. The amount found due from the defendant Blethen is definitely determined, and the several amounts due the creditors who are made plaintiffs in this action are likewise stated, and collection is directed by execution or suit as may be necessary. It is true, no costs are specified, but costs ordinarily follow as a matter of course. A provision for costs alone cannot determine the character of the order. The other requisites of a final judgment are all present. There can be no doubt that this is such a judgment. Black, Judgments (2d ed.), § 41.

It is also true that the receiver is not beneficially interested in the judgment. But he is the representative of the creditors, and authorized by the terms of the judgment to collect the amounts found due therein, and to pay such sums over to the creditors as therein stated. He may not be a necessary party, but he is a proper party to the suit for the purpose of collection and distribution of the amounts due the parties beneficially interested, and made so by the terms of the judgment.

In support of the position that the judgment cannot be enforced outside of the state of Minnesota by the receiver, respondent cites and relies upon *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; *Finney v. Guy*, 189 U. S. 335, 23 Sup. Ct. 558; and *Great Western Min. & Mfg. Co. v. Harris*, 198 U. S. 561, 25 Sup. Ct. 770. In each of these cases it was held that:

“The receiver of a corporation, with no other title to its assets and property than that derived from his appointment in a suit brought to adjudicate and enforce liens and subject the property to the payment of the claims of creditors, cannot be empowered by the court of his appointment to sue in a foreign jurisdiction, either in his own name or in that of the corporation, to realize its assets.” Syllabus to

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Great Western Min. & Mfg. Co. v. Harris, 25 Sup. Ct. 770, *supra*.

These cases upon this point were all based upon the case of *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164, which was a case where a receiver of an insolvent estate, appointed in New York, brought a suit in the United States circuit court for the District of Columbia, to subject a certain fund in the District of Columbia to the purposes of the receivership in New York, to the exclusion of creditors in the District of Columbia. It was there held that the receiver could not maintain the action. In the course of the opinion Justice Wayne, in speaking of the powers of the receiver, at page 337, said:

"He has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek."

Hale v. Allinson was a case where the creditors of an insolvent corporation in Minnesota filed a creditors' bill in the said court, for the purpose of enforcing stockholders' liability to creditors under the Minnesota statute. There were many nonresident stockholders who were not served, and none of them appeared in the action. Judgment was entered against the resident stockholders who were served with process, for the amount of the par value of their stock. No judgment was rendered against nonresident stockholders not served with process. In entering the decree, the court made an order appointing a receiver to collect the judgment against the resident stockholders, and directed the receiver to take all necessary steps against nonresident stockholders to enforce their liability as such stockholders of the insolvent corporation. The receiver was specially directed to institute

actions in foreign jurisdictions. Thereupon the receiver commenced a suit in equity in the United States circuit court of Pennsylvania, to recover the par value of shares of stock held by residents of Pennsylvania, and the court, after reviewing the Minnesota decisions and statutes bearing upon the question, held that the receiver could not maintain the action, and said, at page 67:

"We are of opinion, following the decisions of the highest court of Minnesota, that the statutes of that state do not provide for the appointment of a receiver to recover as such the amount of the added liability of the nonresident shareholders to creditors of an insolvent corporation. They do not provide that such liability shall be assets of the corporation, to be recovered by the receiver and payable to its creditors when such liability is enforced and the money recovered. There is no transfer of any right or title to a receiver to enforce the liability (certainly not as to nonresident stockholders), nor is it a case where any assignment of such right by the creditors has been made, so that the receiver is, in fact, an assignee of the persons interested in the recovery from the stockholders. We are thus brought to the fact that this is a plain and simple case of the appointment, authorized by statute, of a receiver by a court of equity in the exercise of its general jurisdiction as such court, with no title to the fund in him, and where such receiver acts simply as the arm of the court without any other right or title, and the question is whether, in these circumstances, a receiver can maintain this suit in equity in a foreign state by virtue of his appointment, and the direction to sue contained in the decree in the case in which he was appointed a receiver?"

Finney v. Guy was a case where the facts were substantially the same as in *Hale v. Allinson*, except that the receiver joined the creditors as plaintiffs, on bringing suit in Wisconsin to enforce a shareholders' liability under the Minnesota statutes. In referring to this fact, the court said:

" . . . No one creditor can maintain the action under the Minnesota statute, and if all unite, they must sue in the courts of that state."

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This is precisely what was done in the case at bar, and the judgment was rendered against respondent upon personal service. *Great Western Min. & Mfg. Co. v. Harris* was a case where a receiver, appointed over an insolvent corporation in Kentucky, in a general creditors' and foreclosure suit, was attempting to collect from the stockholders residing in Vermont funds fraudulently converted by such stockholders. Each of these cases is clearly and readily distinguished from the case at bar, by the fact that the respondent here is a judgment debtor in the state of Minnesota, where the judgment was rendered against him upon notice by personal service, by a court of general jurisdiction having authority under the laws of that state to render such a judgment. *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069. All of the parties in whose favor the judgment was entered are parties plaintiff in this action. The facts in this case, as stated in the complaint and judgment sued upon, bring it squarely within the case of *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619, where it was said:

"This case brings to our consideration the same constitutional and statutory provisions of the state of Kansas which were before us in *Whitman v. Oxford National Bank*, ante, 563. In that case we decided that a plaintiff, after the recovery of a judgment against a Kansas corporation in the courts of Kansas, and the return of an execution unsatisfied, could maintain an action in any court of competent jurisdiction against a stockholder of the corporation to recover in satisfaction of his judgment an amount not exceeding the par value of the defendant's stock."

In *Hale v. Allinson* and *Finney v. Guy*, the two cases last above cited, were said not to bear upon the questions then under consideration, for the reason, as stated in *Finney v. Guy*, at page 345:

"The statutes are radically different, and no one creditor can maintain the action under the Minnesota statute, and if all unite, they must sue in the courts of that state."

This was what was done in the case at bar. All the creditors united, and obtained a several final judgment against the respondent and other stockholders who were served in Minnesota, and these creditors, together with the receiver who was appointed to enforce the collection and distribute the proceeds pro rata among the creditors, now bring this action in this state to enforce collection of that judgment. It is therefore not an action by a receiver as such, but is essentially one by judgment creditors. We have no doubt of their right to maintain the action under the facts alleged. 23 Am. & Eng. Ency. Law, 1108, §§ 2, 4, and authorities there cited. See, also, note to *Hale v. Allinson*, 47 L. Ed. 380.

In *Childs v. Cleaves*, 95 Me. 498, 50 Atl. 714, the "supreme judicial court" of Maine held that, upon the principle of comity between the states, the same receiver could bring an action against a stockholder resident of Maine, to enforce a stockholder's liability, where the defendant was never served with process and never appeared in the original proceeding in the court of Minnesota. It is not necessary for us to go so far as that in this case.

Respondent next contends that the judgment sued upon is a joint judgment against himself and others named therein, and therefore he cannot be sued alone. An examination of the judgment itself discloses that it appears upon its face to be a several judgment for \$37,888.96 against respondent. But, under the rule in *Olson v. Veazie*, 9 Wash. 481, 37 Pac. 677, 43 Am. St. 855, and *Bignold v. Carr*, 24 Wash. 413, 64 Pac. 519, an action upon a joint judgment may be maintained against one of the judgment debtors alone.

We find nothing in the complaint to justify the contention that the Minnesota court had no jurisdiction to enter the final judgment of July 2, 1903, the one sued upon here. It is true, the complaint states that on July 9, 1897, an interlocutory adjudication was made determining who were creditors and who were stockholders, and the amount for

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which each stockholder was found liable, and providing for the enforcement of such liability and retaining jurisdiction for that purpose; and that, pursuant to such reservation, a final judgment was entered on July 2, 1903. It is only necessary to say in this connection that, if the court rendering the judgment had jurisdiction of the person of respondent as alleged, it retained such jurisdiction to enter a final order in the case, which appears upon the face of the complaint to have been done on July 2, 1903. The mere fact that nearly six years intervened between the interlocutory order and the final judgment, is no indication that the court of Minnesota lost jurisdiction. Neither is there any force in the contention that this action is barred by the statute of limitations. It is certainly not barred by the statutes of this state, and no statute of the state of Minnesota is cited as bearing upon the question. For the reasons herein stated, the lower court erred in sustaining the demurrer.

The judgment of dismissal is therefore reversed, and the cause remanded with directions to the lower court to overrule the demurrer, and require the respondent to answer to the merits.

ROOT, CROW, HADLEY, DUNBAR, and RUDKIN, JJ., concur.

[No. 5076. Decided October 2, 1905.]

N. W. PRESCOTT, *Respondent*, v. PUGET SOUND BRIDGE &
DREDGING COMPANY, *Appellant*.¹

APPEAL—DECISION—LAW OF CASE ON SECOND APPEAL. In an action for damages for breach of a contract to employ plaintiff as long as certain work in Manila should last, a decision of the supreme court upon a former appeal on demurrer to the complaint, that it was not void for uncertainty as to its duration, nor was it for an indefinite period in the sense that either could terminate it at will, and holding that it was not so indefinite that either party was at liberty to terminate it, became the law of the case, and such contract must be held to be valid for a definite term, viz., as long as the work at Manila would last (MOUNT, C. J., and HADLEY, J., dissenting).

Appeal from a judgment of the superior court for King county, Griffin, J., entered November 7, 1903, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Ballinger, Ronald & Battle, for appellant.

Byers & Byers, for respondent.

DUNBAR, J.—This is the second appeal in this case. It was here before upon a question of the sufficiency of the complaint. We then held that the contract sued upon was not void for uncertainty. 31 Wash. 177, 71 Pac. 772. When the cause was remanded, the defendant filed an answer, denying generally the allegations of the complaint, and alleging affirmatively that, by reasonable diligence, plaintiff could have obtained employment of the same kind and of equal wages as alleged in the complaint, and that plaintiff was in no wise injured or damaged by the act of defendant. The affirmative defense was denied by the reply. On these issues the cause was tried to the court and a jury. Verdict was returned in favor of the plaintiff for \$700. Judgment

¹Reported in 82 Pac. 606.

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was subsequently entered upon the verdict, and the defendant appeals.

It is alleged that the court erred, (1) in overruling the defendant's objection to the impaneling of a jury to try the cause, which objection was based upon the ground that the \$12 jury fee required by the statute of 1903 had not been paid as the law requires; (2) in not granting defendant's motion for nonsuit, which motion was based upon the ground that the plaintiff had failed to sustain the allegations of his complaint; (3) in not granting defendant's request for peremptory instructions to the jury to return a verdict for defendant; (4) in allowing plaintiff to introduce evidence showing the length of time that work at Manila would last; and (5) error in certain instructions which we will notice as we proceed.

There is no merit in the first assignment of error, as the jury fee was paid. The second and third assignments are based upon the same hypothesis, viz., that the proof failed to sustain the allegations of the complaint. This question was submitted to the jury on competent testimony, and this court will not disturb its finding in that respect.

The pivotal question in this case is involved in assignment four, alleging error in allowing plaintiff to introduce evidence showing the length of time that work at Manila would last. A copy of the complaint in this action will be found in 31 Wash. 177, 71 Pac. 772, *supra*. It is contended by the appellant that, in no event, could this contract be construed to be a contract for more than a month, and that the former decision of this court was only to the effect that the contract was not so indefinite as to render the same void, and could not be construed to go further than holding that plaintiff was at least entitled to nominal damages. The decision of this court on the former appeal has become the law of the case, so that the construction of such decision is the important question to consider here. We do not think, from a review of such decision, that it can bear the limited

or restricted construction placed upon it by the appellant. In the course of the opinion it is said:

“The contract was one which, if it did not give the appellant the right to enter at once into the service of the respondent, gave him the right to enter therein within a reasonable time after its execution; and was broken, within either view, when the respondent wrongfully, and without cause, refused to permit the appellant to enter into the service at all. It was not, therefore, so indefinite and uncertain as to the time of the commencement of the service as to render it void. Nor was it so indefinite and uncertain as to its duration as to render it void. While its duration was uncertain in the sense that it was not shown how long the work undertaken by the respondent at Manila would last, yet it was not a contract of employment for an indefinite period in the sense that either party could terminate it at will. It was a contract to serve on the one part and to employ on the other, obligatory upon each until the happening of a particular event, and until that event happened neither party could terminate the contract without committing a breach thereof.”

It will be readily seen that the happening of the particular event in this case was the finishing of the projected work at Manila, and the language of this court is absolutely inconsistent with the idea that the damages for the breach would only be nominal, or that the contract could be terminated at the end of the month by either party to the same. The court continuing said:

“A contract of hiring is not indefinite, nor terminable at will, because the precise number of days, months or years that the service is to continue, are not specified. If there is a period of time, be the same fixed or indefinite, during which neither party is at liberty to terminate the contract, then the contract is not so indefinite or uncertain as to its duration as to be incapable of enforcement.”

And it was there held that this particular contract was not so indefinite that either party was at liberty to terminate it. It seems to us that all the questions which are raised

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on this appeal, with the exception of the assigned error in relation to the amount of the judgment, were necessarily involved and decided in the former appeal; for, if the construction that we now place upon the former opinion of this court is correct, the lower court in the present trial did not err in allowing plaintiff to introduce evidence showing the length of time that work at Manila would last, because the ascertainment of this fact was necessary to determine the damages which were sustained by the plaintiff by the violation of the contract on the part of the defendant. The other instructions complained of embrace substantially the same objections.

Finding no error in the record, the judgment is affirmed.

FULLERTON, J., concurs.

RUDKIN and CROW, JJ. (concurring)—We think the trial court construed the contract of the parties in accordance with the former opinion of this court. We therefore concur in the judgment.

MOUNT, C. J. (dissenting)—I dissent. The complaint and the contract in this case both show that the hiring was for an indefinite time, wages payable by the month. The time of the employment was probably definite for one month. *San Antonio R. Co. v. Sale* (Tex. Civ. App.), 31 S. W. 325. It was certainly general and indefinite beyond that time. It might continue for months or for years. In such cases the rule is settled in the United States that the hiring is terminable at any stated period. But where the contract is general and for an indefinite time, it is terminable at will. 20 Am. & Eng. Ency. Law (2d ed.), 14, 15; Wood, Master and Servant (2d ed.), § 136; 1 Lawson, Rights & Rem., § 260; *Speeder Cycle Co. v. Teeter*, 18 Ind. App. 474, 48 N. E. 595; *Baldwin v. Kansas City etc. R. Co.*, 111 Ala. 515, 20 South. 349; *Lord v. Goldberg*, 81 Cal. 596, 22 Pac. 1126,

15 Am. St. 82; *Christensen v. Pacific Coast Borax Co.*, 26 Ore. 302, 38 Pac. 127.

When the case was here before on demurrer to the complaint, we held that the contract was not so indefinite or uncertain as to render it *void*, and the complaint therefore stated a cause of action. The language used in the opinion at that time must be construed with reference to the point the court was called upon to decide. We did not then say that the contract was a hiring for one year or ten years, or any other definite time; but we said:

“If there is a period of time, be the same fixed or indefinite, during which neither party is at liberty to terminate the contract, then the contract is not so indefinite or uncertain as to its duration as to be incapable of enforcement.”

A contract was made in this case. It was legal in all respects. The parties had a right to rely upon it. In my opinion it was enforceable for one month by either party against the other, and for that length of time neither party was at liberty to terminate it. Conceding that what was said in the former opinion is the law of the case, and giving the most liberal construction to the language used, with reference to the point decided, I cannot believe that we intended to hold, or did hold, that the contract was a definite contract for more than one month; because, by its plain terms and by the terms of the complaint, the time of hiring was “for the time the work . . . at Manila should last.” If the term of this contract was not indefinite, it was definite only for one month, by reason of the fact that it was an employment by the month for an indefinite time. This is so clear to my mind that I cannot consent to a judgment for wages for more than one month. The trial court should have so instructed the jury. Because this was not done the cause should be reversed.

HADLEY, J., concurs with MOUNT, C. J.

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Statement of Case.

[No. 5638. Decided October 10, 1905.]

W. H. KNEELAND *et al.*, *Appellants*, v. HARRIET KORTER,
Respondent.¹

PUBLIC LANDS—LANDS BELOW HIGH TIDE—GRANTS—VALIDITY—POWER OF CONGRESS. The United States had the power to grant to a railroad corporation, for some purposes at least, lands below high water mark of tide waters of the territory of Washington; and such a grant, not being void, should be upheld when no facts are shown to render it voidable.

SAME—CONSTITUTIONAL DISCLAIMER—APPLICATION TO SUBSEQUENT PATENT—CONSTRUCTION. The constitutional disclaimer of the state in and to all tide lands patented by the United States, applies to lands below high water mark and within the meander line of the government surveys of land granted by the United States to a railroad corporation prior to the admission of the state into the Union, although the patent therefor did not issue until thereafter, where the railroad company had, by the filing of its map of definite location, and completing its road, become entitled to the patent prior to the adoption of the constitution (MOUNT, C. J., RUDKIN and FULLERTON, JJ., dissenting).

SAME—OFFICIAL SURVEYS—COLLATERAL ATTACK. The official surveys of the government are not open to collateral attack in an action at law between private parties, and the patent must be held to be made with reference to such surveys.

SAME—PRESUMPTION—SURVEYS—MISTAKE AS TO MEANDERS. Where the meander line of the government survey was run years before the adoption of the constitution, and included tide lands below high water mark, it must be presumed that the constitutional disclaimer of title to tide lands patented by the government, had reference to the meander lines run, as establishing the line of high water mark, and not that the tide lands were included within the patent by mistake (MOUNT, C. J., RUDKIN, and FULLERTON, JJ., dissenting).

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered March 11, 1905, dismissing an action of ejectment, upon sustaining a demurrer to the complaint. Reversed.

¹Reported in 82 Pac. 608.

Vance & Mitchell (*Israel & Mackay*, of counsel), for appellants. A grant made by Congress takes effect immediately, unless words of limitation are present preventing it, and the courts incline to carry out the intention of Congress as to the time of vesting title. 9 Am. & Eng. Ency. Law (1st ed.), 56; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. Ed. 551; *Winona etc. R. Co. v. Barney*, 113 U. S. 618, 5 Sup. Ct. 606, 28 L. Ed. 1109; *Missouri etc. R. Co. v. Kansas etc. R. Co.*, 97 U. S. 491, 24 L. Ed. 1095; *St. Paul etc. R. Co. v. Greenhalgh*, 26 Fed. 563; *Johnson v. Ballou*, 28 Mich. 379; *Northern Pac. R. Co. v. Majors*, 5 Mont. 111, 2 Pac. 322. The grant to the railroad company was a present grant upon conditions subsequent, which could only be defeated by breach of condition and divesture of title thereupon by proper legal proceedings on behalf of the United States. *United States v. Curtner*, 38 Fed. 1; *United States v. McLaughlin*, 30 Fed. 147; *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330. A grant *in praesenti* is of the same dignity as a patent and is a contract executed. *Fletcher v. Peck*, 6 Cranch 87, 3 L. Ed. 162. Such grant vests an indefeasible and irrevocable title. *Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650; *Strother v. Lucas*, 12 Peters 410, 9 L. Ed. 1137; *Court-right v. Cedar Rapids etc. R. Co.*, 35 Iowa 386; *Wilkinson v. Leland*, 2 Peters 627, 7 L. Ed. 542. A legislative grant is the highest muniment of title and is not strengthened by a subsequent patent to the same land; the title relates back to the act. *Whitney v. Morrow*, 112 U. S. 693, 28 L. Ed. 871, 5 Sup. Ct. 333; *Wright v. Gish*, 94 Mo. 110, 6 S. W. 704; *Mining Co. v. Consolidated Min. Co.*, 102 U. S. 167, 26 L. Ed. 126; *Starks v. Starrs*, 6 Wall. 402, 18 L. Ed. 925. The constitution should be construed in the ordinary sense in which its words are used and understood by the public. Cooley, Constitutional Lim., 71; Endlich, Interpretation of Statutes, 526. The constitutional disclaimer as to the tide lands is as broad as equity would apparently construe it, and is really a confirmatory grant. *Scurry v. Jones*, 4 Wash.

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468, 30 Pac. 726; *Cogswell v. Forrest*, 14 Wash. 1, 43 Pac. 1098; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. 158, 35 L. Ed. 999; *Leavenworth etc. R. Co. v. United States*, 92 U. S. 733, 23 L. Ed. 634; *Rutherford v. Greene*, 2 Wheat. 196, 4 L. Ed. 218; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 33 L. Ed. 381; *Prosser v. Northern Pac. R. Co.*, 152 U. S. 59, 14 Sup. Ct. 528, 38 L. Ed. 352; *Langdeau v. Hanes*, 21 Wall. 521, 22 L. Ed. 606; *Washougal etc. Transp. Co. v. Dalles etc. Nav. Co.*, 27 Wash. 490, 68 Pac. 74.

H. J. Snively and *Troy & Falknor*, for respondent. The United States had no power to convey the tide lands held in trust for the state. *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632. The constitutional disclaimer was not intended to apply to tide lands in navigable waters or to unpatented lands. *Baer v. Moran Bros. Co.*, 2 Wash. 608, 27 Pac. 470. Grants on navigable tidal waters only extend to high water mark. *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 35 L. Ed. 428; *Craig v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566.

Root, J.—Appellants brought this action to recover possession of eleven acres of tide land, constituting a portion of a 51.31 acre tract of land, surveyed, platted, and designated by the United States government as Lot Three, Section Thirteen, Township Nineteen, North, of Range Three, West, Willamette Meridian, in Thurston county, Washington. They claim title through various mense conveyances from the Northern Pacific Railroad Company, which received a patent to said lot three in December, 1894, pursuant to an act of Congress, passed in 1864, granting to said railroad company the odd numbered sections of public land within a certain distance from the line of railway to

be constructed by said company. It is conceded that the railroad company completed the construction of that portion of the road affecting this locality, in 1884. The filing of the map of definite location was, of course, prior thereto. Respondent having taken possession of said tide lands, this action was commenced and a complaint setting forth the foregoing facts served and filed. A general demurrer was interposed by respondent, and sustained by the trial court. Appellants electing to stand upon their complaint, the action was dismissed. From this judgment of dismissal, appeal is taken to this court.

It is conceded that the only question involved is as to the validity of appellants' title to the said premises, which lie between the lines of ordinary high and ordinary low water marks. Respondent contends that, as the tract in controversy is situated below "high tide line," on the shores of Puget Sound, an arm of the sea, the United States government had no power to dispose of it to the railway company, or at all; but could, and did, hold said tide land in trust for the state of Washington. Appellants assert the right of the United States government to grant such lands prior to the time Washington became a state. Appellants further contend that, if the United States government had no authority to grant these lands, yet, having assumed to do so, its grantees, and their successors in interest therein, can hold the same by virtue of § 2, art. 17 of the state constitution, which reads as follows:

"The State of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States; Provided, The same is not impeached for fraud."

Respondent answers this contention by the claim that this section of the constitution does not apply to this character of lands; or, if it does, that it can apply only to lands for which patent had already issued at the time of the adoption of the state constitution. Appellants urge that the

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virtue of a patent dates from the time of the inception of the grantee's rights in the land, and not merely from the time of the patent's issuance.

We think the complaint shows appellants to have a good title to the tide lands in question. Congress has power, at least for some purposes, to grant lands below high water mark, where the same are situated within the geographical limits of a territory, although that power be no longer retained when such territory becomes a state. The supreme court of the United States, in an elaborate and carefully considered opinion by Mr. Justice Gray, in *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, among other things, said:

"Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a Territory of the United States, it is evident that this is not strictly true. Chief Justice Taney, in delivering an opinion already cited, after the subject had been much considered in the cases from Alabama, said: 'Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a state.' *Goodtitle v. Kibbe*, 9 How. 471, 478. . . . By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition. *American Ins. Co. v. Canter*, 1 Pet. 511, 542; *Benner v. Porter*, 9 How. 235, 242; *Cross v. Harrison*, 16 How. 164, 193; *National Bank v. Yankton County*, 101 U. S. 129, 133; *Murphy v. Ramsey*, 114 U. S. 15, 44; *Mormon Church v. United States*, 136 U. S. 1, 42, 43; *McAllister v. United States*, 141 U. S. 174, 181. . . . The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters."

In the case of *Prosser v. Northern Pac. R. Co.*, 152 U. S. 59, 14 Sup. Ct. 528, 38 L. Ed. 352, the same court, in passing upon the identical land grant now under consideration, said:

"It may be admitted that the Congress of the United States, while the present State of Washington was a Territory, had the power, in chartering a corporation to construct and maintain a railroad from Lake Superior to the Pacific Coast, to grant to the corporation such title or rights in lands below high water mark of tide waters of the Territory, as might be necessary or convenient for the building, maintenance, use and enjoyment of such structures as might be required for commerce and transportation on the railroad and by sea, and for transferring goods and passengers between the railroad and sea-going vessels. *Shively v. Bowlby*, just decided, *ante* 1; *In re New York Central & Hudson River Railroad*, 77 N. Y. 248; *In re Staten Island Rapid Transit Co.*, 103 N. Y. 251."

Under these decisions, we cannot hold the grant of these lands void, and no facts are now shown which render it voidable. But as to whether or not the United States government had power to, or as a matter of law did, grant and convey the particular tide land in controversy here, it is not necessary now to decide, as this case can be determined upon another ground.

It is admitted that the United States government did issue to the railroad company a patent covering this land. It was not so issued until 1894; but the consideration, on account of which it was issued, had been furnished many years before Washington became a state, and the railroad company had been entitled to a patent ever since said time. When our state constitution was adopted and we became a state, it was known that the United States had in some instances granted, or assumed to grant, certain tide lands lying below high water mark. In order to prevent any controversy over said lands, and to avoid disturbing rights claimed under such conveyances, § 2, art. 17, of the state constitution was

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adopted. While this section is in terms a disclaimer merely, yet it has been held by this court to be in effect a conveyance of the state's interest in these lands, and confirmatory of the government's grant thereof. In *Scurry v. Jones*, 4 Wash. 468, 30 Pac. 726, this court, speaking by Hoyt, J., used the following language:

"The language of § 2 of art. 17 is that 'the State of Washington disclaims all title in and claim to all tide, swamp and overflowed lands patented by the United States; provided the same is not impeached for fraud,' and fairly construed, we think it must be held to have, in effect, confirmed the patents which covered such lands. For, while it is true that the language used is not in form confirmatory, yet, when we take into consideration the situation of affairs, and the object to be accomplished by such disclaimer, we do not see how this object can be given force without construing the language used as substantially a grant to the patentees of the interest of the state in the land so situated. Under the law, as conceded by both parties, the lands had passed absolutely to the state, subject only to such clouds thereon as were caused by the same having been assumed to have been granted to private individuals by the United States. Under such circumstances, if the state disclaims all of its title to such lands, where the patents had been obtained without fraud, it certainly was for the benefit of some one, and it clearly could not have been for the benefit of the United States. . . . In our opinion, the interest of the state passed as fully to the grantees in such patents, or to those holding under them, as it would have done had there been express words of grant used in the constitution. Any other interpretation of the language used would deprive it of any beneficial force whatever."

In *Cogswell v. Forrest*, 14 Wash. 1, 43 Pac. 1098, this court, speaking by Dunbar, J., said:

"This is tide land patented by the United States and it is not impeached for fraud, and no matter whether the meander line or the body of water along which the meander line runs is the true boundary. The boundaries of this particular tract of land are settled by the grant in the plat and field notes. The land was granted according to the official

grant of the survey of such lands, and the plat itself and its notes, lines and descriptions become a part of the grant or deed by which they are conveyed as much as if the description was written out on the face of the deed itself. See *Cragin v. Powell*, 128 U. S. 691 (9 Sup. Ct. 203). The constitutional convention of this state, with a commendable sense of honor, thought it but simple justice to disclaim title to all tide lands patented by the United States without regard to the technical right of the general government to convey the same, and there is nothing in the language of the constitution that would indicate that the convention intended to make any distinction between lands which had been patented through the medium of the donation act, and those which had been patented under the pre-emption or commutation acts, or even of private entry. The principle involved in this case, we think, was identical with the principle involved in *Scurry v. Jones*, *supra*, and the judgment will therefore in all respects be affirmed."

To the contention that this section of the constitution applies only to lands patented at the time of its adoption, it may be answered that such a construction would sacrifice the spirit of the section. Can it be supposed that the constitution makers intended to discriminate between two persons who had, in good faith and for value, become entitled to all of the government's property rights in certain portions of such lands—one of whom had already received his evidence thereof (the patent), and the other of whom had not, although equally entitled thereto? It seems to us that this would be to give consideration to form rather than substance, and to make a distinction justified neither in law or right. It has been the holding of the courts that the virtue of a patent dates from the time the patentee became entitled to it, and not merely from the date of its issuance. In the case of *Stark v. Starrs*, 6 Wall. 402, 18 L. Ed. 925, the United States supreme court, speaking by Mr. Justice Field, used the following language:

"The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent

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to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants."

In the case of *Missouri etc. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491, 24 L. Ed. 1095, in discussing a railroad grant, the United States supreme court said:

"As to the intent of Congress in the grant to the plaintiff there can be no reasonable doubt. It was to aid in the construction of the road by a gift of lands along its route, without reservation of rights, except such as were specifically mentioned, the location of the route being left within certain general limits to the action of the plaintiff. When the location was made and the sections granted ascertained, the title of the plaintiff took effect by relation as of the date of the act, except as to the reservations mentioned; the act having the same operation upon the sections as if they had been specifically described in it. . . . The construction thus given to the grant in this case is, of course, applicable to all similar congressional grants, . . ."

The railroad became entitled, in 1884, to whatever patent the government could, under its grant, issue to these lands. It was at that time entitled to, and was the owner of, every property interest in said land which the United States government could, by virtue of said grant, convey. It was such owner and so entitled by reason of having fully complied with the conditions subsequent of the grant, the statute constituting a grant *in praesenti*, with conditions subsequent. *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330; *Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578.

This case is readily distinguishable from that of *Mann v. Tacoma Land Co.*, 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714. In that case an attempt was made to locate Valentine scrip upon tide lands, no part of which was subject to such scrip. The would-be locator had no rights whatever to the tide lands he was seeking to file upon with the scrip, and there was no legal authority by which he ever

could, with said scrip, acquire any rights in or to any portion of such lands. In the case at bar, there is no question as to the railway company's right to a patent to the principal part of lot three; but it is contended that said lot, as surveyed, contains certain lands it should not, and that the patent is invalid as to such portion. In other words, the survey is claimed to have been erroneous. It may sometimes be difficult to definitely and accurately locate the line of ordinary high tide. Physical changes going on for a number of years may alter the location of said line. There must be, touching a survey, some authority recognized for legal purposes as correct. It would seem that the survey made by the United States surveyors, after standing forty years or more, as has this, should constitute such authority. It should be presumed as correct in a case where its disturbance would upset titles and destroy the rights of those who have in good faith relied upon it for many years. "The official surveys made by the government are not open to collateral attack in an action at law between private parties." *Whitaker v. McBride*, 197 U. S. 510, 25 Sup. Ct. 530, and cases cited; *Stoneroad v. Stoneroad*, 158 U. S. 240, 15 Sup. Ct. 822, 39 L. Ed. 966; *Russell v. Maxwell Land Grant Co.*, 158 U. S. 253, 15 Sup. Ct. 827, 39 L. Ed. 971; *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68. In *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428, the supreme court said:

"In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie."

In speaking of the effect of a patent, the United States supreme court, in *Whitney v. Morrow*, 112 U. S. 693, 5 Sup. Ct. 333, 28 L. Ed. 871, said:

"If, by a legislative declaration, a specific tract is confirmed to any one his title is not strengthened by a subse-

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quent patent from the government. That instrument may be of great service to him in proving his title, if contested, and the extent of his land, especially when proof of its boundaries would otherwise rest in the uncertain recollection of witnesses. It would thus be an instrument of quiet and security to him, but it could not add to the validity and completeness of the title confirmed by the act of Congress. *Langdeau v. Hanes*, 21 Wall. 521; *Ryan v. Carter*, 93 U. S. 78; *Tripp v. Spring*, 5 Sawyer, 209, 216."

See, also, upon this and other points, the case of *Deseret Salt Co. v. Tarpcy*, 142 U. S. 241, 12 Sup. Ct. 158, 35 L. Ed. 999.

As the railroad company had been entitled to its patent long before the adoption of the state constitution, we think it was as much entitled to the benefit of the disclaimer of § 2 as if it had already received its patent at the time. We can see no reason for discrimination, and cannot hold that the people intended any.

It is urged by the respondent that the action of the United States government in issuing the patent for these tide lands was a mistake on the part of some of its officers or servants—that the government did not intend to grant or convey any land below high water mark. Ordinarily it is not to be presumed that public officers or servants have made a mistake in a given matter. The presumption is usually the other way. But, suppose it was a mistake, is it not one of the very "mistakes" or circumstances which the people had in mind at the time they adopted the disclaimer section *supra*? When Congress passed the statute making the land grant to this railway company, it did not assume to grant a certain number of acres, or a certain number of sections, or any definite quantity; but it undertook to grant a certain class of *sections* of land, and their identity was defined by reference to the system of government survey. In other words, the railway company was granted every alternate section located within forty miles of the line established by the

definite location of its railway line. These sections were not defined as so many acres, surveyed or platted by the railway company or the county surveyor or state surveyor; but, they were the sections as shown (and to be shown) by the maps and plats prepared by the government from the field notes and surveys of its own surveyors. In *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566, the United States supreme court said:

“It is a well-settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.”

The land in question was surveyed years prior to the time of the admission of this state into the Union, and prior to the filing of the map of definite location of route by the railway company. The enactment of the statute, the filing of the map of definite location, and the survey and platting of these lands, all having taken place years before Washington attained statehood, it must be presumed that the railway company was holding and claiming all of said lot three, including these tide lands, in accordance with said government survey, and that the constitution makers had in mind all such grantees when they adopted the disclaimer aforesaid. The mere fact that the patent, which is but an evidence of a right earned before its issuance, was not actually issued until after the adoption of the constitution, can in our opinion constitute no good reason for depriving the grantee of the benefits sought to be conferred by this section of the constitution. If, as respondent claims, a mistake was made, it first occurred at the time the lands were surveyed. As no attempt has been made during these many years to correct said mistake, and as the government itself, in issuing the patent, recognized the same boundaries estab-

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lished long before by its surveyors, we are unable to see wherein the ends of justice would be subserved by this court at this time overturning appellants' title upon the theory that the government officials made a mistake. This lot three (including said tide land), has been sold and conveyed several times, all grantees evidently assuming the description to be correct and the title good. To hold that neither appellants nor any of their predecessors in interest ever had any title to these lands, would, in our opinion, be to permit the very result which the disclaimer clause in the state constitution was intended to avoid.

We conceive the facts set forth in appellants' complaint sufficient to constitute a cause of action. The judgment of the honorable superior court is reversed, and the cause remanded for further proceedings.

CROW, HADLEY, and DUNBAR, JJ., concur.

RUDKIN, J. (dissenting)—It seems to me the majority opinion assumes the very question in controversy in this case. It assumes that the United States granted, or attempted to grant, this eleven acres below ordinary high tide, covered and uncovered by the flow and ebb of the tide, to the Northern Pacific Railroad Company, by the act of July 2, 1864, and then concludes that this grant was confirmed by § 2 of art. 17 of the state constitution, which provides as follows:

"The state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: Provided, the same is not impeached for fraud."

In my opinion, the assumption on which the majority bases its conclusion has no foundation in law or in fact. The defendant contends that Congress could not make a valid grant of tide lands within the territory of Washington, as the United States held such lands in trust for the future state. The plaintiffs contend the contrary. I do not think that that question is involved in this case. If any proposi-

tion is settled by the decisions of the federal courts, it is this, that general grants of land, such as the homestead laws, the pre-emption laws, the donation acts, the grant to the Northern Pacific Railroad Company, and all similar acts and grants, do not extend to or include tide lands. In *Mann v. Tacoma Land Co.*, 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714, Justice Brewer, in delivering the opinion of the court, said:

“It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands.”

The grant to the Northern Pacific Railroad Company stopped at ordinary high tide on Puget Sound. There is no more pretense for claiming that it extended beyond this than there would be for claiming that it extended beyond the forty-mile limit. The only effect of the extension of the public surveys, the filing of the map of definite location, and the construction of the road, was to locate the grant. It will scarcely be contended that the ministerial officers of the United States, in erroneously extending the public surveys below ordinary high tide, carried land grants with them. Had the plaintiffs in this action no other right or title than that conferred by the act of July 2, 1864, and were they relying upon such title alone, I have little doubt that a showing that the land was below ordinary high tide, and was therefore not included within the grant, would be a full and complete defense to the action.

Was the claim of plaintiffs, or their predecessor in interest, confirmed by the constitutional provision above quoted? I cannot believe that it was. In *Mann v. Tacoma Land Co.*, *supra*, the court said that the state “excluded from its claim of title lands which the government had, in the due administration of its land department, disposed of by a patent.” Let us look for a moment at the conditions which confronted the framers of the constitution. The state-to-be asserted “its ownership to the beds and shores of all navigable

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waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." Art. 17, § 1, State Const. Within the knowledge of the framers of that instrument, patents had already issued for portions of these tide lands, and, in justice to these patentees, the next section*disclaimed all title in, and claim to, all tide, swamp, and overflowed lands patented by the United States. The disclaimer only extended to such tide lands as had already been patented. It cannot be maintained that the state commissioned the general government to patent tide lands in the future, and I do not understand that the majority so hold. As heretofore stated, the general land laws and general land grants do not extend to or include tide lands. Therefore, all existing patents issued under the general land laws for tide lands were issued without authority of law, and were void. This constitutional provision was, in effect, a grant of these lands from the state, and this court so held in *Scurry v. Jones*, 4 Wash. 468, 30 Pac. 726. As a grant from a sovereign state, it should be strictly construed. Nothing passed by implication or by intendment. A constitution is framed with much greater care and deliberation than an ordinary statute, and greater effect is always given to the language used in the former. If I concede that the disclaimer should not be confined to lands patented—which I do not—it should not be extended beyond lands which were the equivalent of patented, at most, and these lands were not. The addition of the proviso, "Provided the same is not impeached for fraud," affords conclusive evidence, to my mind, that the framers of the constitution had in mind the claims of individuals patented under the general land laws in due course of administration, and not cases like the present; for how could a grant by Congress be impeached for fraud?

Let us confront the constitutional convention with the facts

in this case as they stood at the time of its deliberations. The Northern Pacific Railroad Company had no legal or moral claim to this land, it was not within its grant, and no patent had issued. The utmost that could be claimed was that the public surveys had been inadvertently or erroneously extended below ordinary high tide; for, as said by the court in *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224:

“The United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water.”

Would the convention have confirmed the title of the railroad company to this land, and to all lands similarly situated under such circumstances? I can conceive of but one answer to this question, and that answer is not found in the majority opinion. It seems to me that the decision of the supreme court of the United States in *Mann v. Tacoma Land Co.*, *supra*, if followed, disposes of every question involved in this appeal. The plaintiff in error in that case, prior to the adoption of the state constitution, had selected and scripped certain tide lands in Elliott bay, and the selection had been approved by the local land office. He had received a certificate from the local land office, certifying that he was entitled to a patent for the land selected as soon as the lands were surveyed by the general government. It was contended in his behalf that his title was confirmed by the constitutional provision relied on by the plaintiffs in this case. In answer to that contention, the supreme court of the United States said:

“Reliance is also placed on art. 17, § 2, of the constitution of the state of Washington, which reads: ‘The state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: provided, the same is not impeached for fraud.’ In respect to this it is enough to say that these lands were not patented. It is doubtless true, as said by this court in *Stark v. Starrs*,

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6 Wall. 402, 418, that the 'right to a patent once vested is treated by the government when dealing with the public lands, as equivalent to a patent issued.' But here there was no right to a patent. The entry in the local land office, and the receipt issued by the local land officers, were unauthorized acts, and gave no right to a patent; and it cannot be supposed that the state of Washington, when it excluded from its claim of title lands which the government had in the due administration of its land department disposed of by a patent, meant thereby to exclude every tract for which a local land officer might wrongfully issue a receiver's receipt."

To this we might well add, "nor to exclude every tract over which the ministerial officers of the government had wrongfully extended the public surveys."

The above decision also disposes of what is said in the majority opinion about the doctrine of relation. In conclusion, the opinion of the majority rests upon the following statement contained therein:

"The railroad became entitled, in 1884, to whatever patent the government could, under its grant, issue to these lands. It was at that time entitled to, and was the owner of, every property interest in said land which the United States government could, by virtue of said grant, convey. It was such owner and so entitled by reason of having fully complied with the conditions subsequent of the grant, the statute constituting a grant *in praesenti*, with conditions subsequent."

What I have said sufficiently shows that this declaration is entirely inconsistent with the decisions of the supreme court of the United States. The Northern Pacific Railroad Company acquired no interest whatever in this land in 1884, or prior thereto, or at any time, until a patent was wrongfully issued years after the adoption of the state constitution.

For these reasons I dissent from the majority opinion.

MOUNT, C. J., and FULLERTON, J., concur with RUDKIN, J.

[No. 5340. Decided October 12, 1905.]

PATRICK J. WOODS, *Respondent*, v. GLOBE NAVIGATION
COMPANY, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANTS—MASTER OF SHIP AND SEAMAN. The master of a ship is not a fellow servant with an ordinary seaman obeying his orders in the work of navigating the ship.

MASTER AND SERVANT—NEGLIGENCE—INJURY TO SEAMAN—DUTY TO WARN OF CHANGE OF COURSE OF SHIP—QUESTION FOR JURY. In an action for personal injuries sustained by a seaman in the navigation of a ship at sea the question of the negligence of the defendant is for the jury, where there was conflicting evidence as to whether it was the duty of the master of the ship to give the seaman warning of an order for the change of course of the ship whereby, as claimed, the seaman might have protected himself from injury.

NEW TRIAL—SURPRISE—DILIGENCE. A new trial on the grounds of surprise from the absence of a witness or from unexpected testimony will be denied unless the claim is promptly made and a continuance asked.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 23, 1904, upon the verdict of a jury rendered in favor of the plaintiff for injuries sustained by a seaman during a gale at sea. Affirmed.

Root, Palmer & Brown, for appellant.

Wm. Martin and *W. A. Keene*, for respondent.

CROW, J.—On December 24, 1903, the steamship "Tampico," owned and operated by appellant, the Globe Navigation Company, left Tacoma, Washington, on a voyage to the Hawaiian Islands. Respondent, Patrick J. Woods, who was aboard said ship as an able seaman, was injured while on the Pacific Ocean, and brought this action for damages sustained.

The complaint alleged, that respondent was injured by reason of the negligence and carelessness of the master in

¹Reported in 82 Pac. 401.

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Opinion Per CROW, J.

charge of said ship; that on January 5, 1903, a hard gale was blowing and the sea was running high; that respondent, being subject to the orders of the master, was directed by him to assist in setting a sail; that while he was so doing, the sheet (a rope attached to the boom) fouled in the shackles, and respondent was directed to loosen the same; that while he was attempting to loosen said sheet, the master, without giving him any warning or notice, ordered the helm "hard down," which said order was executed by the helmsman; that the effect thereof was to quickly change the course of the ship and cause it to broach by suddenly bringing it broadside against the waves of the sea; that in consequence thereof, the waves struck with great force against the side of the ship where respondent was working, and carried him across the deck, causing him to strike against certain iron stanchions, breaking his leg.

Appellant denied that said injury was caused by any negligence on the part of the owners of said vessel; alleged that the broaching of the vessel resulted from the inability of the crew to manage the same, on account of the violence of the elements, and by reason of the fact that the steering apparatus had, as a consequence of violent storms, become out of order; and that, if there was any negligence, it was that of the respondent himself, or of a fellow servant. These affirmative allegations were denied by the reply. Upon a jury trial, a verdict was rendered in favor of respondent for \$2,000; and a motion for a new trial being denied, judgment was entered upon said verdict, and this appeal has been taken.

On the trial respondent's contention was that it is the custom of officers in charge of sea-going vessels to give notice and warning to seamen, while in the discharge of their duties, of any sudden change in the course of the ship, so that such seamen may protect themselves from danger resulting therefrom; that, as the master of the Tampico failed to give warning of his order to place the helm hard down, he was

guilty of negligence causing respondent's injuries. Appellant in its brief contends that the owner of a ship is not liable for injuries to an employee caused by the unskillful act of the officers in charge; that, if the ship owners use proper care and diligence in selecting competent officers to command and direct, the company is not liable to a seaman for an injury caused by some particularly poor judgment or unskillful act on the part of such officers while in command; and appellant, at the trial, asked the court to charge the jury in substance in accordance with this contention. This proposition of appellant is based upon the further contention that, even if negligence be conceded on the part of the master, yet appellant is not liable for the reason that the act of the master was one done in the operation of the vessel; that the same being an operative act performed in the course of navigation, and not on behalf of the owners, but having to do solely with the boat at a time of peril, was the act of a fellow servant, and the consequence thereof was a risk assumed by respondent, when he entered the service of appellant. In other words, the contention of appellant is that no liability exists upon its part by reason of the fact that the relation of fellow servant existed between respondent and the master of said vessel.

Appellant, has cited numerous authorities which seem to sustain its view. These authorities, however, are taken almost entirely from decisions of the federal courts, in which the fellow servant doctrine is different from that heretofore announced by this court. We think the position of appellant, that the master and respondent were fellow servants, cannot be sustained in view of our former holding in *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415, 58 Pac. 224, where it was held that the relation of fellow servant does not exist between the captain or mate and an ordinary seaman.

As above suggested, respondent contended that it was the custom on sea-going vessels for a master or mate to give

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notice or warning of an order such as the one claimed to have been given in this case, which was given without such warning; and that, by reason thereof, respondent, having no opportunity to protect himself, was injured. All these claims were strenuously denied by appellant, both in its pleadings and by evidence upon the trial. From an examination of the record, we find a serious conflict of evidence on these points. It therefore became necessary for the court to submit them to the jury for determination. This was done, and the verdict justifies us in assuming that the findings were in favor of respondent. There being ample evidence to sustain the verdict, it must remain undisturbed.

Appellant made a motion for a new trial, in which it urged the foregoing points, and also contended that it was entitled to a new trial by reason of surprise. In support of said motion, appellant's attorney who tried the case filed an affidavit showing that one Hall, who had been subpoenaed as a witness by appellant and had promised to attend the trial, had, without notifying appellant or its attorney, failed to appear when wanted; that the testimony of said Hall was of great importance, and that his unexpected absence constituted surprise. Said attorney, by his affidavit, also stated that one Tollefson, the ship's carpenter, made statements upon the witness stand entirely at variance with what he had previously told appellant and its attorneys, which statements were very damaging to appellant, and also constituted surprise. Appellant now insists that, by reason of said surprise, it should be granted a new trial, and that the trial court erred in refusing the same. A new trial will not be granted on the ground of surprise arising from the absence of a witness or from unexpected testimony, unless a claim to such surprise is promptly made during the trial, and a continuance asked in order that the party applying may secure the attendance of the absent witness and produce evidence to meet the emergency. There is nothing in the record showing this to have been done. We therefore think

no error was committed by the court in refusing a new trial. 14 Ency. Plead. & Prac., 723; *Pincus v. Puget Sound Brewing Co.*, 18 Wash. 108, 50 Pac. 930; *Reeder v. Traders' Nat. Bank*, 28 Wash. 139, 68 Pac. 461; *Gaines v. White*, 1 S. D. 434, 47 N. W. 524.

The judgment is affirmed.

MOUNT, C. J., DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

Root, J., having been of counsel, took no part.

[No. 5072. Decided October 14, 1905.]

THE SEATTLE ELECTRIC COMPANY, *Respondent*, v.
SNOQUALMIE FALLS POWER COMPANY
et al., *Appellants*.¹

SPECIFIC PERFORMANCE—INJUNCTION—CONTRACTS—ELECTRIC POWER FOR RAILROAD—PUBLIC INTEREST—EVIDENCE. In an action for an injunction to compel a power company to perform its contract to furnish power to a street railroad company, the evidence sufficiently shows the necessity where it appears that the facilities of the street railroad company for generating power were not sufficient to create any reserve force, which is necessary to furnish power for continuous use.

SAME — CONTRACTS — VIOLATING FRANCHISES — ENFORCEMENT. A court of equity will compel the performance of a contract of a power company to furnish power to a street railroad company, for a reasonable time to enable the company to obtain a supply from other sources, where the public interests are involved and require it, notwithstanding the contract was not enforceable between the parties owing to a clause therein violating the franchise of the power company.

Appeal from a judgment of the superior court for King county, Hatch, J., entered October 6, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, granting a mandatory injunction

¹Reported in 82 Pac. 713.

compelling the defendants to continue to furnish electric power. Affirmed.

Thomas B. Hardin, for appellants.

Piles, Donworth & Howe, for respondent.

PER CURIAM. — The appellant Snoqualmie Falls Power Company was incorporated in January, 1898, for the purposes of manufacturing and selling electricity to public and private consumers, for heat, light, and power purposes. Its capital stock was fixed at \$500,000, divided into 5,000 shares of the par value of \$100 each, all of which with the exception of four were subscribed for, and have since been owned, by one William T. Baker. In August, 1898, the city of Seattle granted a franchise to the said Baker, running for a period of 36 years, conferring upon him the right to erect poles upon the streets of that city and string wires thereon for the purposes of distributing therein electricity generated at the power plant of the Snoqualmie Falls Power Company. The franchise contained a number of restrictions intended for the benefit of the consumers of the product of the plant. It required the grantee to distribute the current manufactured by him at "his Snoqualmie Falls Power House" to "all persons and corporations desiring the same" on equal terms and under reasonable regulations, and prohibited him from entering into any combination whatsoever whereby the public or the city would be deprived of the benefits of competition in the purchase of electricity. Immediately on obtaining this franchise, Baker organized another corporation called the Seattle Cataract Company, and assigned to this company all the rights he had acquired by the grant to him of the above mentioned franchise. The capital stock of this company was fixed at \$100,000, divided into 1,000 shares of the par value of \$100 each. Of these shares Baker has likewise owned the entire issue except a mere nominal number.

In January, 1900, the respondent corporation was organ-

ized. At that time the street railways and the electric lighting systems of the city of Seattle were under the control of a number of companies and corporations, operating separately and independently of each other, and the respondent was incorporated for the purpose of acquiring and consolidating these into one system. To that end it succeeded in purchasing almost the whole thereof, since which time it has been, and was at the time of the commencing of this action, engaged in the business of conducting street railways in the city of Seattle and its suburbs, having in operation at the last mentioned time some seventy-nine miles of track. It was also engaged in the business of supplying electric lights for public and private use, and electricity for power purposes to private owners as well as to the city of Seattle.

On January 20, 1900, the respondent entered into a contract with the Snoqualmie Falls Power Company by the terms of which the latter company agreed to sell to the former three thousand (3,000) continuous electrical horse power, to be delivered at such time or times and in such quantities as might be called for by the respondent, for the sum of fifty-four thousand (\$54,000) dollars per annum (being at the rate of \$18 per horse power per annum), to be paid in monthly installments; agreeing further to allow the purchasing company a certain excess of power in case it might desire it at the same rate per horse power per annum it paid for the 3,000 horse power. This additional power was afterwards fixed at 250 continuous horse power. The contract entered into between the parties contained numerous conditions, among which was a condition to the effect that no electric current should be sold in the city of Seattle by the Snoqualmie Falls Power Company to be used in any branch of business in which the respondent was engaged, a condition in direct violation of the ordinance under which electric current was permitted to be brought from the power plant of the Snoqualmie Falls Power Company into the city of Seattle.

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The parties continued to operate under the terms of this contract until the morning of May 24, 1903, when the Snoqualmie Falls Power Company, in violation of the terms of the contract, and without notice, cut the connection between its generator and the respondent's power plant; and, when inquiry was made as to cause, stated that it had decided not to continue any longer in the performance of the contract. Thereupon the appellant brought this action against it and against the Seattle Cataract Company, to compel the performance of the contract. A temporary mandatory injunction was issued compelling the appellants to furnish the power until a final hearing could be had on the question at issue between the parties, and on this hearing the injunction was continued in force until June 1, 1904, the court granting to the respondent that length of time in which to obtain power from other sources. The appeal is from the last mentioned judgment.

In its complaint the respondent set out the contract above mentioned, and alleged a compliance therewith on its own part. It further alleged that it was a public service corporation engaged in the business of operating street car and electric light systems in the city of Seattle by electric power; that its own generating plants were not designed for and were insufficient to furnish the power necessary to operate its systems; and that, unless the appellant Snoqualmie Falls Power Company should be compelled to continue in the performance of its contract, it would be unable to keep its system of railways and lights in operation, thereby causing great annoyance and injury to the public and to those who were dependent upon it to furnish them with transportation and light; and that already great confusion had been caused by the cutting off of the power theretofore furnished it by the appellant last named. The prayer was for relief appropriate to the allegations of its complaint. The appellants, answering, denied that the respondent was without means of its own to generate sufficient power for its own use; and

set out affirmatively the negotiations leading up to the formation of the several corporations, the execution of the contract, and averred that the contract was designed to create a monopoly and was in direct violation of the franchise granted to Baker, under which the appellant corporations operated, and was therefore null and void, and such as a court of equity would not enforce. The reply was a denial of all of the affirmative allegations of the complaint going to show a participation by the respondent in any unlawful acts, or acts against public policy, or knowledge on its part of any violations of their franchise or of public policy by the appellants.

The evidence in the case is voluminous, and the arguments of counsel in this court have taken a wide range, but it seems to us that the real question presented by the record is one not difficult of solution. It will be remembered that the trial court did not undertake in its judgment to compel a specific performance of the contract between the parties, but held that the evidence justified the conclusion that the facilities under the command of the respondent were not then sufficient to enable it to generate sufficient electric current to enable it to operate in an efficient manner the public facilities it was required by its franchise to operate, and it required the appellants to continue to furnish the power the respondent had contracted with it to furnish, and had relied upon, only until such reasonable time as the respondent could supply itself from other sources. The only questions presented, therefore, are, did the court err in its finding that the respondent had not sufficient facilities under its own command to enable it to operate sufficiently the public conveniences operated by it; and, after finding that it did not, did it err in holding as a matter of law that the appellants could be compelled to furnish the power they had contracted to furnish until the respondent could with reasonable diligence acquire such facilities. Both of these questions we think should be answered negatively. It must be borne in mind

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that the questions are not reviewed out of any regard for the appellants. Their confessed violation of their duties to the public cannot be overlooked when they seek redress in a court of equity. Moreover, we cannot but feel that their conduct in cutting off the current they had agreed to furnish found its inspiration in the fact that they had discovered a place where they could dispose of it on more profitable terms than the contract afforded them, rather than from any compunctions of conscience because of their past misconduct. But the respondent seems from the evidence not to have been entirely free from blame in its contract with the appellants, hence it is proper to inquire whether it could have performed the public duties required of it without the aid of the power furnished it by the appellants. The evidence reasonably justifies the conclusion that it could not. While it may have had sufficient facilities for generating power to have carried the load required of it even at its most extreme point, it is made clear that this is not sufficient to constitute a safe working basis. Machinery, no matter how perfectly made, will get out of repair, and it is found that, to furnish power for continuous use, there must be a reserve force equal to the largest single unit used in generating such power. This the respondent did not have, and its claim that power from the appellants' power plant was necessary to secure an uninterrupted service seems to have been justified.

Conceding that the power was necessary, there can be no serious dispute over the questions of law involved. While courts of equity will not enforce contracts entered into either in violation of positive law or a rule of public policy where the interests of the parties thereto are alone involved, yet, when the public interests are involved, it will enforce such a contract as long as such public interest requires it. It would have been a greater wrong than any to which the appellants confessed to have permitted them arbitrarily and without warning to stop from operation the street car and lighting

systems of the city of Seattle; especially when the only justification offered for it is a former willful violation of their franchise privileges. Neither courts of law nor equity will lend countenance to a plea so utterly without justification.

The judgment appealed from is affirmed.

[No. 5571. Decided October 16, 1905.]

THE CITY OF PORT TOWNSEND, *Respondent*, v. THOMAS F. TRUMBULL *et al.*, *Appellants*.¹

TAXATION—FORECLOSURE OF TAX LIEN—PLEADING—OWNERSHIP AND INTEREST—COMPLAINT—SUFFICIENCY. The allegation, in a complaint to foreclose a tax lien, that certain of the defendants were the owners of the property in fee simple, is not open to the objection by the other defendants that they are thereby shown not to have any interest in the property.

SAME—APPEAL—INTEREST OF DEFENDANTS—RIGHT TO REVIEW. The defendants in a tax lien foreclosure, in order to object to the judgment upon appeal, must show that they are interested in the property.

SAME—MATTERS OF PUBLIC RECORD—COMPLAINT—SUFFICIENCY. In an action to foreclose a tax lien, a motion to make the complaint more definite and certain by setting forth the proceedings, which are all matters of record, is properly denied.

SAME—LIMITATION OF ACTIONS—SPECIAL CHARTER PROVISIONS—CONSTRUCTION. Under the charter of the city of Port Townsend, providing that taxes levied thereunder shall have the effect of a judgment lien which should not be satisfied or removed until paid, the general statute of limitations for the commencement of actions does not apply to an action brought to foreclose the city's tax lien.

SAME—JUDGMENT—EXCESSIVE. A judgment foreclosing a tax lien is excessive where it exceeds the tax, penalty, and legal interest.

Appeal from a judgment of the superior court for Jefferson county, Hatch, J., entered July 9, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, foreclosing a lien for taxes. Modified.

¹Reported in 82 Pac. 715.

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Opinion Per RUDKIN, J.

Trumbull & Trumbull, for appellants.*A. W. Buddress*, for respondent.

RUDKIN, J.—Plaintiff brought this action against the defendants to foreclose a lien for taxes levied by the plaintiff city against certain real property for the years 1892, 1893, and 1894. The complaint alleged that the real property in controversy was owned in fee simple by the defendants T. F. Trumbull and wife, and that the other defendants had or claimed some interest therein which was subordinate and subject to the tax lien. The defendants other than T. F. Trumbull and wife appeared and demurred to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action. The demurrer was overruled and the demurring defendants elected to stand on their demurrer, and refused to plead further. The defendants T. F. Trumbull and wife moved to make the complaint more definite and certain by stating the time and manner in which the assessment roll was made and prepared, under and by virtue of what ordinances the proceedings took place, at what time and in what manner and under what ordinances the city council levied, assessed, and imposed the tax, and in what manner and under what ordinances a tax roll was made, certified, and delivered to the city treasurer for the collection of the taxes in suit. This motion was denied, and the defendants T. F. Trumbull and wife interposed a demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action, and that the action was not commenced within the time limited by law. The demurrer was overruled, and the defendants answered over, denying certain allegations of the complaint. A trial was had, which resulted in a judgment in favor of the plaintiff as prayed in its complaint. From this judgment defendants have appealed.

The first error assigned is in behalf of the appellants other than T. F. Trumbull and wife. The only ground of this

assignment which is not common to the other appellants is that it does not appear from the complaint that these particular appellants have any interest in the property in suit. The complaint alleged that T. F. Trumbull and wife were the owners in fee simple of the property, and it is contended that this allegation precludes any interest in the other appellants. This objection is over-technical and without merit. Ownership in fee in one person is not inconsistent with a claim to the same property by another. If these appellants had no interest in the property in controversy, they are not affected by the judgment and will not be heard to complain. If they had any interest, it was their duty to set such interest forth by answer.

The first error assigned in behalf of T. F. Trumbull and wife is in the order denying the motion to make the complaint more definite and certain. The assessment rolls, ordinances, and other proceedings, which the appellant sought to require the respondent to set forth in detail, were all matters of public record, equally accessible to both parties, and the court did not abuse its discretion in denying the motion. *Ferry v. King County*, 2 Wash. 337, 26 Pac. 537.

The next error assigned relates to the ruling on the demurrer of T. F. Trumbull and wife. The sufficiency of a similar complaint and the defense of the statute of limitations were fully considered by this court in *Port Townsend v. Eisenbeis*, 28 Wash. 533, 68 Pac. 1045, and we must decline to reconsider the questions there decided. The demurrer was properly overruled.

We have considered the other assignments, and find them without merit, except the claim that the judgment is excessive. This exception must be sustained. The assessment rolls offered in evidence show the following taxes only: For the year 1892, \$2.80; for the year 1893, \$10.88; for the year 1894, \$1.50. Add to these several amounts the ten per cent penalty for collection imposed by the city ordinance, and the legal rate of interest imposed by the city charter,

the total amount will not exceed the sum of \$30.50. The judgment of the court below must be reduced to that amount and, as thus modified, the judgment is affirmed. In view of the small amount involved, and of the fact that this particular objection does not appear to have been called to the attention of the court below, neither party will recover costs on this appeal.

MOUNT, C. J., CROW, DUNBAR, ROOT, FULLERTON, and HADLEY, JJ., concur.

[No. 5839. Decided October 16, 1905.]

THE STATE OF WASHINGTON, *on the Relation of Spokane Falls & Northern Railway Company, Plaintiff,*

v. THE SUPERIOR COURT FOR SPOKANE

COUNTY *et al.*, *Defendants.*¹

EMINENT DOMAIN—APPLICATION BY RAILWAY TO CONDEMN LANDS APPROPRIATED BY ANOTHER RAILWAY — NECESSITY — FINDINGS — EVIDENCE—SUFFICIENCY. No sufficient necessity is shown for a condemnation by one railroad of lands appropriated by another railroad for its city terminals, already restricted on one side by a river and on the other by another railroad, where it appears that the lands were hardly sufficient, and were absolutely required by the defendant company, that the petitioner's ostensible object of the condemnation was to reach certain business houses and manufacturing plants to which it already had means of access over the tracks of another railroad company, and also by other routes, and the only reason why it did not reach the point over several other available routes was the question of expense, and there was no attempt to show what such extra expense would be; since the necessity must be great to justify the right to appropriate the terminal grounds of another company.

SAME—DEFENDANT RAILWAY NOT IN OPERATION—ROAD BEING ESTABLISHED—LANDS PURCHASED FOR TERMINALS—PROTECTION OF RIGHTS. A railroad company not yet in operation will be protected from the appropriation of its terminal rights to the same degree as a road that is in operation, where it appears that it is constructing its road, and would be in operation in the near future, and had spent large sums in securing terminals; since it is necessary to secure terminal facilities before beginning operation.

¹Reported in 82 Pac. 417.

Certiorari to review a judgment of the superior court for Spokane county, Huneke, J., entered September 5, 1905, upon findings in favor of the defendant, after a trial before the court without a jury, dismissing on the merits a petition to condemn a railway right of way across land appropriated by another railway for terminal purposes. Affirmed.

M. J. Gordon and C. A. Murray, for relator.

Graves & Graves and Allen & Allen, for defendants.

DUNBAR, J.—This is an application for a writ of certiorari to review the judgment of the superior court of Spokane county, dismissing the petition of the Spokane Falls & Northern Railway Company to condemn certain lands in the city of Spokane, which had been appropriated by the Spokane International Railway Company. The land sought to be appropriated was a strip thirty feet in width, a distance of about four blocks between Division street and Washington street. Without the filing of a map with this opinion, which is impracticable, it would be impossible to intelligently describe the situation to any one not acquainted with the city of Spokane, the names of its streets, and the location of its railroads and depots. The main questions to be determined, however, are the necessity on the part of the petitioner to use the ground sought to be condemned, and the effect of such use on the defendant; the question whether a corporation, having the power to condemn lands by our law of eminent domain, can appropriate the property of another corporation which had already been devoted to public purposes, having been determined by this court in favor of the right of such condemnation in the case of *Seattle & Col. R. Co. v. Bellingham Bay etc. R. Co.*, 29 Wash. 491, 69 Pac. 1107. In this case all technical questions have been waived by stipulation, and the cause is certified here for adjudication upon the merits.

The finding of the court is—and such finding is warranted by the testimony—that the petitioner was organized under

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the laws of the state of Washington, in the year 1889, for the purpose of building a railway from the city of Spokane to the international boundary line; that thereafter it built a line of railway between Spokane, in Spokane county, and Northport, in Stevens county. Its Spokane terminus was fixed at a point north of the Spokane river and south of Mallon avenue, and immediately east of, and running up to, Division street. The road thus built was operated for some years, when the control of the road was acquired in the interest of the Great Northern Railway Company, and ever since the road has been practically controlled and managed by the Great Northern, although maintaining an independent legal existence, and having general officers, in the main being the same as certain of the general officers of the Great Northern. The testimony shows that several years ago the track of the road between Colbert, some distance north and east of Spokane, and the town of Hillyard, immediately north of Spokane and adjoining the city limits, was taken up. The track from Hillyard into its yards was not used thereafter, except for storing cars and switching and for a general service track. The passenger trains of the road were operated over the line of the Great Northern from said Colbert into the Great Northern depot at Spokane; the freight trains were operated from Colbert to Hillyard over the line of the Great Northern, and were there broken up and handled by the Great Northern to their destination within the city limits. The passenger depot of the company near Division street was sold and removed; the freight depot was rented for other purposes, and the terminal grounds were entirely abandoned, except in so far as they were used in connection with the track between Hillyard and this point as aforesaid.

Prior to January 17, 1905, D. C. Corbin had in contemplation the building of a line of railway between Spokane and the international boundary line at a point in Kootenai county, in the state of Idaho, and, with a view of obtaining

terminal grounds for passengers, freight, roundhouses, and other general purposes, in Spokane, he commenced purchasing property in said city in River Front and Pittwood's additions and in block 74 of Central addition. This property lies between the Spokane river on the south of it and the Oregon Railway & Navigation Company's tracks and the Union depot grounds on the north of it, and between Washington street on the west and Division street on the east, and is property which is embraced in the terminal grounds through which this condemnation is sought. On the 17th day of January, 1905, the defendant Spokane International Railway Company was organized under the laws of this state, and immediately after that its entire capital stock was subscribed, its board of trustees organized and its officers elected, and all things done necessary to entitle it to do the business for which it was organized. Immediately thereafter its board of trustees, by resolution, directed its engineer to locate its line in the city of Spokane. The following finding is made by the court:

"The ground thus selected for its depot and terminal grounds was necessary to said defendant for said purposes. The whole quantity of said ground so selected is needed by said defendant, and it is practically impossible for it to do with less. Indeed, it will have in all probability difficulty in accommodating all of its buildings and tracks within these tracts of land."

The court also found that the petitioner had been guilty of bad faith in its attempt to obtain a right of way through these terminal grounds; that it was in reality the Great Northern Railway Company; that the Great Northern Railway Company had a right of way south of the Spokane river immediately between Division street and Washington street, which would be a feasible way for the petitioner to reach the business which it sought to reach by the condemnation proceedings; that it could, also, with slight expense, reach the same point by traversing a route north of the Oregon Railway & Navigation Company's terminal grounds. The

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ostensible object of the condemnation of this thirty-foot strip is to reach certain business houses and manufacturing plants west of Washington street and northwest of Havermale's Island, it being alleged and proven on the trial that something like one hundred cars a month, which were consigned to the petitioner's railroad, were sent out from these manufactories; that said cars had to be switched by the O. R. & N. Co., and that a charge of \$3 a car was made for such service by the O. R. & N. Co., and that the shipper had to pay this extra expense. The land sought to be condemned, however, did not reach to these manufactories or plants, but only to an unused right of way of the Great Northern Railway Company, which led out in that direction, so that, in any event, the output of such factories would have to be handled by the Great Northern.

Although it is established in this jurisdiction that one railroad company has a right to condemn property of another, such right of condemnation cannot be claimed for slight reasons. It is evident that the operation of the cars of one company through the terminal grounds of another should be avoided if possible, and that such operations are liable to lead to difficulties, accidents, and trouble generally. If, however, the necessity is great, either on account of the prohibitive expense incident to the building of the road of the petitioning company in any other locality or by reason of engineering impossibilities, the condemnation will be permitted if the result is not seriously deleterious to the company whose lands are sought to be condemned. In this case it was testified by the engineers and by the manager of the Great Northern Railway Company, who seemed also to be the manager of the petitioning company, that the only reason why the petitioning company could not run the route north of the O. R. & N. Company's terminal grounds was a question of expense. But there was nothing definite testified to; no estimate had been made of these routes, no attempt, evidently, to determine what the extra expense, if any, would

be. In speaking of this proposition, Mr. Lewis, Eminent Domain, § 267b, says:

"It is manifest, however, that even a railroad company which is organized under a general law, may show a reasonable necessity for taking part of the right of way of another road, as when it is located through a town in which another road has been previously built and the topography or other conditions are such that the new road cannot reasonably be located so as to accommodate the public and accomplish the object in view without either encroaching on the right of way of another company or incurring ruinous or greatly increased expense. The same necessity may arise in mountainous countries, or else the first company might preclude all others from reaching certain localities. But this implied authority only extends to the taking of so much of the right of way of the first company as can be spared without material detriment. The question is, 'Whether the new condemnation can be made without destroying the use and usefulness of that part of the first-acquired right of way which is in actual use, or so obstructing or hindering or embarrassing it as to render it unsafe.' Just what the degree of necessity must be to justify the taking it is difficult to say. One company cannot take part of the right of way of another merely because it is more convenient. It is largely a question of practicability and expense, of comparative advantage and injury, having regard always to the interests of the public, for whose benefit the general authority is given, and the particular taking proposed. If no reasonable or sufficient necessity is shown the taking must be denied under the general rule."

And the same rule prevails in relation to taking the lands used for depots, yards, shops, and other appurtenances. It was shown by the testimony of the petitioner that the same point could be reached by building on the south side of the Spokane river, the distance being practically the same, the only extra expense being the building of two bridges. There was no testimony on the part of the petitioner as to what the cost of these bridges would be, there having been no estimates made, the principal contention on the part of the petitioner being that any additional business would congest

the yards of the Great Northern. The amount of extra transportation to be obtained, which was the alleged object of the petitioner in condemning this strip of ground, was so small that it could scarcely be taken into consideration in relation to the question of congestion. But, conceding that additional business would congest the terminal grounds of the Great Northern, that would be no reason for incommoding the defendant company and congesting its terminal grounds. For the court finds, and the testimony positively shows, that the International Railway Company had not obtained any more terminal facilities than it needed, nor as much; that it would be crowded for room; that it could not obtain any more room on the north by reason of its close proximity to the O. R. & N. Company's terminal grounds, nor on the south by reason of the river. Hence, if this testimony was true, the taking would simply be relieving one company at the expense of another, and no authority, we think, would grant a condemnation of the property of one railroad by another for such alleged reasons.

It is true that the International railroad is not yet in operation, but the testimony shows that a large portion of the grading has already been contracted for, and that the whole road will be in operation in the near future; that it has traffic relations with the Canadian Pacific, and expects to be in reality the western portion of a transcontinental road. Although it is not yet in operation, companies of this kind must procure grounds for terminal facilities before they commence their operations. The necessity of the business requires this, and, when once they make their calculations to procure these facilities, which this company did at an expense of \$150,000 in purchasing this land, they will be protected in those terminal rights to the same degree as will a company which is already operating its roads. This rule was laid down by this court in a case recently decided, viz., *Nicomien Boom Co. v. North Shore Boom etc. Co.*, ante p. 315, 82 Pac. 412 (decided Sept. 30, 1905). The court in

that case, after reviewing the law in relation to railroads and finding that railroads are analogous to boom companies, they both being corporations for public service, said:

“Applying the rule followed in the railroad cases, appellant had the right, after filing its plat of location, to acquire the title to the lands within the limits of its location. It was an absolute right which it could enforce by condemnation proceedings to the exclusion of any other boom company that might seek to appropriate the same land. It did acquire these lands, not by condemnation, but by purchase. Having thus established its location and acquired the necessary lands, it proceeded to construct its boom, but did not construct it throughout the entire located territory, although it has always intended to do so as the public demand might require. We think in reason that the appellant had the right when it filed its plat of location and acquired property for the purpose of constructing its boom, to take into consideration the future requirements of its business, and that it should not be restricted merely to the territory required at the time its first works were erected. It would seem that this must be so, in view of the obligations appellant assumed as a public service corporation.”

The lower court in this case, after stating certain matters which were proven, in its findings of fact, says:

“The foregoing facts taken in connection with all the facts and testimony in the case convinces me that the petitioner is not acting in good faith in this matter, but is endeavoring to harass and impede the work of the defendant company; or, at the least, that the building of the line in question is an afterthought. The petitioner could build a line, making the connection it desires, by running to the north of the O. R. & N. tracks and the Union depot grounds aforementioned. The line thus proposed would be but a trifle longer, and it does not appear that it would involve prohibitive expense. None of the officers of the petitioning company or of the Great Northern appear to have endeavored to inform themselves upon the feasibility of this line. The same connection likewise could be made at slightly increased expense, by crossing the Spokane river from the old Spokane Falls & Northern depot to a connection with the Great Northern, and thence by

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way of Havermale's Island. The cost of building additional bridges and a slightly increased amount of trackage is the only objection to this course, except that the terminal grounds of the Great Northern are said already to be congested. Save for this latter objection, too, the connection could be made over the lines of the Great Northern from Hillyard to Havermale's Island, and thence across the north fork of the river to the Seattle, Lake Shore & Eastern track. The only increased expense thereby would be the building of one bridge across the north fork of the river. I am unable to find any necessity for the building of the proposed track. I do find, however, that it would render impracticable the use of the proposed terminal grounds by the defendant, and that it has, and can acquire, no other terminal grounds near the business part of the city."

We think the whole testimony justifies this statement by the court. But if only the last part of the statement were true, that it would render impracticable the use of the proposed terminal grounds by the defendant, and the defendant could acquire no other terminal grounds, that would be proper grounds upon which to deny the application.

We think, under all authority and in accordance with just dealing, from a review of the whole record, the judgment of the lower court should be affirmed. It is so ordered.

MOUNT, C. J., CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

Root, J., concurs in the result.

[No. 5507. Decided October 16, 1905.]

WALLA WALLA COUNTY, *Respondent*, v. THE OREGON
RAILROAD & NAVIGATION COMPANY, *Appellant*.¹

HIGHWAYS — TAXES — REFUND CERTIFICATES — RECOVERING MONEY PAID ON FRAUDULENT CERTIFICATE. Where a railroad company employed a county road supervisor to work out its road tax, for the purpose of securing a refund of the taxes paid to the county, the supervisor acts as the agent of the company and not in his official capacity and the railroad company would be liable to the county for the amount of the refund received by it in good faith upon the fraudulent certificate of the supervisor, issued without having done the work; since the knowledge of the supervisor as agent of the company would be imputed to it, and in such case the county would not be estopped by reason of the act of the supervisor as its officer.

SAME—PARTIES. In an action by a county to recover a refund paid to a taxpayer through the fraudulent act of a county road supervisor in wrongfully issuing a certificate, the supervisor is not a necessary party defendant.

LIMITATIONS—FRAUD. The statute of limitations does not begin to run against an action by the county to recover money paid upon a fraudulent road tax refund certificate until the money was refunded and the fraud discovered.

TAXES—HIGHWAYS—REFUND CERTIFICATES—ACTIONS. An action by a county to recover a refund upon a road tax is an action for money paid and not one to recover taxes.

SAME—DEFENSE—VALIDITY OF TAX. One who voluntarily pays a tax cannot raise objections as to its validity.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered October 7, 1904, on motion of the plaintiff, upon the pleadings and a stipulation, in an action to cancel a road property tax certificate and recover the money refunded thereon. Affirmed.

W. W. Cotton, Arthur C. Spencer, and James G. Wilson, for appellant, contended, among other things, that the county was estopped to repudiate the act of its officer acting within

¹Reported in 82 Pac. 716.

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the scope of his authority, and the taxpayer had a right to rely upon the certificate. *Mechem, Public Officers*, § 842; *People ex rel. Ambler v. Auditor General*, 38 Mich. 746; *Curnen v. The Mayor*, 79 N. Y. 511; *People v. Stephens*, 71 N. Y. 527; *O'Leary v. Board of Education*, 93 N. Y. 1, 45 Am. St. 156; *Dennison v. Keokuk*, 45 Iowa 266; *Austin v. Bremer County*, 44 Iowa 155; *Thorington v. City Council*, 88 Ala. 548, 7 South. 363; *American Bridge Co. v. Wheeler*, 35 Wash. 40, 76 Pac. 534; *Chicago etc. R. Co. v. Joilet*, 79 Ill. 25; *Logan County v. Lincoln*, 81 Ill. 156; *Block v. Commissioners*, 99 U. S. 686, 25 L. Ed. 491; *Lyons v. Munson*, 99 U. S. 684, 25 L. Ed. 451; *Town of Weyauwega v. Ayling*, 99 U. S. 112, 25 L. Ed. 470; *Hackett v. Ottawa*, 99 U. S. 86, 25 L. Ed. 363; *County of Warren v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *County of Tipton v. Locomotive Works*, 103 U. S. 523, 26 L. Ed. 340; *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411; *County of Jasper v. Ballou*, 103 U. S. 745, 26 L. Ed. 422; *Insurance Co. v. Bruce*, 105 U. S. 328, 26 L. Ed. 1121; *Sherman County v. Simons*, 109 U. S. 735, 3 Sup. Ct. 502, 27 L. Ed. 1093.

John L. Sharpstein and Lester S. Wilson, for respondent, to the point that there is no estoppel as to the wrongful acts of officers of a municipal corporation, cited: *Board of Comr's v. Nelson*, 51 Minn. 79, 52 N. W. 991, 38 Am. St. 492; *Caspary v. Portland*, 19 Ore. 496, 24 Pac. 1036, 20 Am. St. 842; *Bulger v. Eden*, 82 Me. 352, 19 Atl. 829; *Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *Martel v. East St. Louis*, 94 Ill. 67; *Axt v. Jackson School Tp.*, 90 Ind. 101; *Berry v. Bickford*, 63 N. H. 328; *Sievers v. San Francisco*, 115 Cal. 648, 47 Pac. 687, 56 Am. St. 153.

Root, J.—This action was instituted by respondent to cancel a road property tax certificate executed and delivered to the appellant by the road supervisor of road district No. 31, of Walla Walla county, and to recover a road tax of

\$295.62. From a judgment in favor of respondent, this appeal is taken.

The sum of \$295.62 was assessed and levied against appellant's property in said road district for the year 1901, which amount appellant paid to the county treasurer. Under the statute, appellant had the right to do work itself, or hire the same done, in said district, and thereupon secure a certificate from the road supervisor of said district, upon which certificate it could obtain from the county treasurer a refund of the amount theretofore paid by it. One Thompson was road supervisor of said district during the years 1901 and 1902. Appellant contracted with said Thompson to work out the \$295.62 tax assessed against it as aforesaid, and paid him \$221.71 as compensation for so doing. Thompson did not do the work nor any part thereof, but falsely and fraudulently issued to appellant a certificate that the requisite amount of labor had been done to satisfy said tax of \$295.62. Appellant, in good faith as a matter of fact, presented this certificate to the county treasurer and received \$295.62 therefor. Neither appellant nor the county treasurer nor any other county official, excepting Thompson, knew that the work had not been performed. The respondent, upon learning of the fact, demanded a repayment of the money refunded to appellant and, this demand being refused, began this action.

We think the trial court's judgment should be sustained. Under the statute, appellant was entitled to a refund only in consideration of its doing work in the road district equal in value to the amount of the tax paid in. It is urged by appellant that it acted in good faith and that the fraud was on the part of respondent's official, the road supervisor; that said official was the only one authorized to issue certificates; and that, when he did so, appellant had a right to rely upon it. Under some circumstances, the argument would be sound. But its weakness here lies in the fact that this road supervisor was not only an officer of the county in this transaction,

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but he was also the agent of appellant. The \$221.71 was paid by appellant to Thompson as its agent and not to him as road supervisor. The contract to do the work was with him as its agent and not as a public official. Neither the county, nor its road supervisor, in such capacity, was a party to the contract between appellant and Thompson, as an individual. As an official, Thompson had no authority, actual or apparent, to enter such a contract.

Ordinarily, an innocent party acting in good faith may rely upon the actions of a public official (except in the exercise of certain governmental functions) within the apparent scope of his authority, and may hold the municipality liable for such acts of its official. But here the appellant is not, in contemplation of law, an innocent party. Thompson was its agent. As such, he knew that the work had not been performed when he executed and delivered the certificate. He knew that he was perpetrating a fraud. A knowledge of all this being possessed by appellant's agent, must, as a matter of law, be imputed to it as principal. Where an official or agent performs, in favor of a certain person, an act which he has no right to do, although it comes within the apparent scope of his authority, his action cannot be held to bind his principal in favor of said person who has knowledge of his lack of authority. In this case Thompson, as road supervisor, had no right to issue a certificate until the requisite amount of work was done. Thompson, as appellant's agent, knew this and knew that the work was not performed, and that the certificate was illegally and fraudulently issued. As appellant's agent, it was his duty to impart this information to his principal. In not doing so, he has caused his employer to suffer as those must who are so unfortunate as to employ unfaithful agents.

The certificate in itself has no virtue. The consideration for the refunding of the tax was not the possession of a certificate, but the performance of the work. The certifi-

cate was intended merely as the evidence of the work having been done. Within the meaning of the statute, the performance of the work constituted the consideration for the withdrawal of the money. Consequently, when appellant, by means of a fraudulent certificate, secured a refund without having performed the road work, it received something for nothing. It acquired money from the county for which it gave that municipality no equivalent. The money, thus paid it, was the fruit of a fraud perpetrated by a man acting in a dual capacity, agent of appellant and official of respondent. Municipalities should not be holden for malfeasances of their officials committed under such circumstances. The money having been obtained without consideration and without authority of law, and as a result of fraud participated in by appellant's agent, the county is entitled to maintain its action.

It is urged that Thompson was a necessary party defendant. We do not think so.

Appellant also claims that the county waived any right of action it may have had by not commencing the same within two years from the date appellant received the certificate. In a case of this kind, the statute of limitations could not begin to run until the money was refunded and the fraud detected by the complaining party.

It is contended that a money judgment cannot be had because this is a tax and not a debt. The tax was paid. Appellant did not withdraw a tax—it withdrew \$295.62 of the county's money. The action is as for money had and received—not to recover a tax due.

It is also asserted that no showing is made as to this being a just or legal tax that was assessed and levied against appellant's property. As appellant voluntarily paid the tax, we do not think it can now be heard to question its validity.

It is also insisted that the county is estopped to repudiate the action of one of its officials. What we have said hereinbefore shows that no principle of estoppel can be invoked

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against a municipality under circumstances of this character.

Appellant contends that if the certificate is cancelled, it still has the right to work out the tax. If so, it will doubtless be able to have its money refunded, after it has paid the judgment herein, if the statute so permits. This question is not here for decision. Other questions are suggested, but what we have already said disposes of them.

The judgment of the superior court is affirmed.

MOUNT, C, J., CROW, RUDKIN, FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 5690. Decided October 20, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN
PACKENHAM, *Appellant*.¹

CRIMINAL LAW—YOUTHFUL OFFENDERS—CERTIFICATION OF PROCEEDINGS TO SUPERIOR COURT—JURISDICTION. Under Bal. Code, §§ 6722, 6724, upon the conviction before a justice of the peace of a boy between the ages of 8 and 16 years, for disturbing a public school, it is the duty of the justice to certify the proceedings to the superior court for the purpose of determining whether the offender is a fit subject for the reform school; and in such case the justice has jurisdiction of the offense, and there is no trial before the superior court for the purpose of ascertaining the guilt or innocence of the accused.

JURY—RIGHT TO TRIAL BY JURY. A youthful offender tried before a justice of the peace for the offense of disturbing a public school waives his right to a jury trial by not demanding the same before the justice.

CRIMINAL LAW — DISTURBING SCHOOL — STATUTES — CONSTRUCTION. Laws 1903, p. 328, prescribing a penalty for disturbing a public school by any "person" applies to and includes a "pupil" of such school who was not attending the school at the time the offense was committed and was outside of the school building.

¹Reported in 82 Pac. 597.

APPEAL—RECORD—STATEMENT OF FACTS. Upon an appeal from a judgment of the superior court, upon the certification of proceedings before a justice of the peace, wherein a youthful offender was convicted of disturbing a public school, errors during the progress of the hearing cannot be reviewed in the absence of a statement of facts.

STATUTES—TITLE—SUFFICIENCY. Laws 1903, p. 325, entitled, an act relating to the public schools, defining certain offenses and providing penalties, is not open to the objection that it embraces more than one subject which is not expressed in its title, by reason of including in the general law pertaining to school matters provisions prescribing a penalty for minor offenses relating to the public schools.

CRIMINAL LAW — YOUTHFUL OFFENDERS — HEARING IN SUPERIOR COURT—FAILURE TO APPEAL. A boy between the ages of 8 and 16 years, convicted before a justice of the peace of disturbing a public school, who fails to appeal from said judgment to the superior court, is not entitled to a rehearing on said charge or a trial by jury upon the certification of the proceedings to the superior court for the purpose of determining whether he should be sent to the reform school.

Appeal from an order of the superior court for Lewis county, Rice, J., entered January 23, 1905, upon the certification of a judgment of a justice's court convicting a minor of the offense of disturbing a school, after an examination before the court without a jury, committing the defendant to the reform school. Affirmed.

W. W. Langhorne, for appellant.

J. R. Buxton and *A. J. Falknor*, for respondent.

CROW, J.—On the 11th day of January, 1905, a complaint was filed with W. A. Westover, justice of the peace for Chehalis precinct, Lewis county, Washington, charging appellant, John Pakenham, and three other defendants, with having disturbed the West Side school, in the city of Chehalis, in violation of § 12, Chap. 156, Laws of 1903, page 328. A warrant being issued, appellant was brought before said justice, tried without a jury, and found guilty. It having appeared at said trial that said appellant was a boy of sane mind, between the ages of eight and sixteen years, said justice, in accordance with the provisions of Bal. Code,

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§ 2722, forthwith sent him, together with all papers, to the judge of the superior court of Lewis county. Afterwards, on the 23d day of January, 1905, the Honorable A. E. Rice, judge of said superior court, having theretofore in the presence of appellant, his parents, and attorney, conducted the examination provided by Bal. Code, § 2724, made an order that the said John Pakenham be committed to the state reform school at Chehalis, Washington. From said order and judgment, this appeal has been taken.

Said justice had jurisdiction to try appellant (3 Bal. Code, § 4683, Laws 1901, p. 34), who was then and there entitled to demand and secure a jury trial. Bal. Code, § 6668. The record does not show any such demand to have been made, but does show that appellant was regularly tried and found guilty by said justice. It having appeared that appellant was a boy of sound mind, between the ages of eight and sixteen years, it was the duty of said magistrate to certify all his proceedings to the superior court of Lewis county, and to forthwith send appellant before the judge of said court. By reason of appellant's age, the justice of the peace could not impose any penalty, after having convicted him. No appeal appears to have been perfected from the judgment of said magistrate, nor have legal steps of any character been taken by appellant to obtain a review of his proceedings.

Appellant contends that the superior court was without jurisdiction to summarily try him on a criminal charge, and insists that he was entitled to a trial by jury in said superior court. We think this contention is without merit. He was not being tried in the superior court upon any criminal charge, nor was he sent to the judge of said court for any such purpose. The magistrate could not impose any penalty upon him after his conviction, as, by reason of the provisions of Bal. Code, §§ 2722-2724, it became the duty of the superior court judge, in the presence of appellant's parents, to proceed to take the voluntary examination of ap-

pellant, to hear the statements of any party appearing for him, and such testimony in relation to the case as might be produced, and ascertain whether he, having been convicted of the offense charged, was a fit subject for the reform school. This is exactly what was done, and such a proceeding was not a trial of appellant by the superior court for the purpose of ascertaining his guilt or innocence of the charge theretofore preferred against him before the magistrate. Appellant has not been deprived of any constitutional right of trial by jury. He had the right to demand a jury before the magistrate. Having failed to make such demand, or to appeal from the magistrate's judgment of conviction, he is now in no position to complain.

Appellant also contends that the complaint upon which he was arrested fails to state facts sufficient to constitute any offense under the laws of this state. His argument in support of this proposition is that § 12, of the statute of 1903, Laws 1903, p. 328, uses the word "person" but does not use the word "pupil." He urges that, as the record transmitted to the superior court by the justice, which is now before us as a part of the transcript, shows he was a pupil of the school alleged to have been disturbed, he could not be charged with the offense named, under said statute, which, in the use of the word "person," did not contemplate a pupil. It is true said record shows he was a pupil of said school. It also shows that, from the beginning of the school year in 1904, until the date of the offense charged, to wit, January 10, 1905, he had attended school but fourteen days, notwithstanding the fact that the proper school authorities had been constantly endeavoring to compel his regular attendance. He was not attending the school at the time the offense was committed, but was outside of the school building. In any event, we think the statute is not susceptible of the construction urged by appellant, and that the complaint did state facts sufficient to charge an offense

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without regard to the question as to whether appellant was, or was not, an enrolled pupil of said school.

Other errors have been assigned, based upon alleged rulings made by the judge of the superior court during the progress of the hearing had before him. But we do not think they are properly before us for review, as appellant failed to propose any statement of facts showing the proceedings in the superior court, and no such statement is now in the record. The order committing appellant to the reform school appears to be regular upon its face, and in strict compliance with the law, and we must presume, in the absence of any statement of facts, that all prior proceedings leading up to the entry of such order were regular and without error.

Appellant also contends that the act of 1903, under which he was arrested, is unconstitutional, as being in violation of § 19, art. 2, of the constitution of the state of Washington, which provides that "No bill shall embrace more than one subject, and that shall be expressed in the title." The title of the act in question reads as follows:

"An Act relating to the public schools of the State of Washington; defining certain offenses; providing penalties therefor; repealing sections 159 to 175, both inclusive, approved March 19, 1897; and declaring that this chapter shall constitute Chapter 11 of said Code of Public Instruction and declaring an emergency." Laws 1903, p. 325.

An examination of the entire act will show that all offenses therein enumerated pertain to school matters and public schools of the state of Washington. The act is not subject to the objection urged, as it deals with but one general subject, which is embraced in the title.

Appellant has only appealed from the proceedings and order of the superior court, which did not at any time conduct a trial for the purpose of ascertaining whether he was guilty or innocent of the offense with which he had been charged; but was only endeavoring to determine what dis-

position should be made of him after he had been theretofore convicted before a magistrate having jurisdiction to try him. It must be remembered that this cause was not transferred to the superior court, by any act of appellant, to prosecute an appeal or institute proceedings to review the judgment of said magistrate, but was taken into said court because of the statutory duty of the magistrate to certify it there. Had appellant desired to obtain a review of the proceedings leading up to his conviction, he should have taken proper steps, by appeal or otherwise, to obtain such review by the superior court. This he has failed to do. Hence the only question before us for consideration is whether the proceedings in the superior court were free from prejudicial error. On the record, in the absence of any statement of facts, we fail to find any such error.

The judgment is affirmed.

MOUNT, C. J., ROOT, DUNBAR, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 5748. Decided October 20, 1905.]

I. WICK, *Respondent*, v. TACOMA EASTERN RAILROAD
COMPANY, *Appellant*.¹

NEGLECT—FIRES—DAMAGES FROM FIRE STARTED BY LOCOMOTIVE—ORIGIN OF FIRE—EVIDENCE—SUFFICIENCY. In an action for damages against a railroad company by reason of a fire, there is sufficient evidence to warrant the finding of the jury that the fire originated from the defendant's locomotives, where it appears with reasonable certainty that such a fire started some four days before on the west side of the track and was traced to the plaintiff's property, notwithstanding the evidence tended to show the existence of a number of other fires in the vicinity.

¹Reported in 82 Pac. 711.

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Citations of Counsel.

SAME—INTERVENING CAUSES AS DEFENSE—WIND—VERDICT—CONCLUSIVENESS. A railroad company cannot claim exemption, by reason of intervening causes, from liability for a fire originating from its locomotives, where the issue is determined against them by the jury, upon proper instructions.

SAME—INSTRUCTIONS—REVIEW. In an action against a railroad company for damages for a fire originating from its locomotives, it is not prejudicial error to instruct the jury as to the duty of the company to exercise reasonable care to arrest the spread of fires so originating, "or which have been otherwise set upon its right of way," where the jury are further instructed that they could not find for the plaintiff unless the fire originated from the defendant and that the defendant was guilty of negligence which proximately started the fire or permitted it to spread.

SAME—TITLE TO PROPERTY DESTROYED—INSTRUCTIONS—VERDICT. In an action against a railroad company to recover for wood destroyed by a fire which originated from the defendant's locomotives, error cannot be claimed in that the title to a portion of the wood was not in the plaintiff at the time of the fire, when the jury were instructed that the plaintiff could not recover for wood cut by a third person, if the title thereto did not pass to the plaintiff until it had been measured up, unless it had been measured at the time of the fire.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered March 7, 1905, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action to recover damages for property destroyed by fire started by defendant's locomotive. Affirmed.

Shackleford & Hayden, for appellant, to the point that there was not sufficient evidence to show the origin of the fire, cited: 13 Am. & Eng. Ency. Law (2d ed.), 531; *Brown v. Atlanta etc. R. Co.*, 19 S. C. 39; *Finkelston v. Chicago etc. R. Co.*, 94 Wis. 270, 68 N. W. 1005; *Baxter v. Great Northern R. Co.*, 73 Minn. 189, 75 N. W. 1114; *Brennan Lumber Co. v. Great Northern R. Co.*, 77 Minn. 360, 79 N. W. 1032; *Minneapolis Sash & Door Co. v. Great Northern R. Co.*, 83 Minn. 370, 86 N. W. 451; *Kansas Pac. R. Co. v. Butts*, 7 Kan. 308; *Montague v. Minneapolis etc. R. Co.*, 96 Wis. 633, 72 N. W. 41; *Lake Erie etc. R. Co. v.*

Gossard, 14 Ind. App. 244, 42 N. E. 818; *Louisville etc. R. Co. v. Mitchell*, 17 Ky. Law 977, 29 S. W. 860; *Denver etc. R. Co. v. DeGraff*, 2 Colo. App. 42, 29 Pac. 664; *Cook v. Minneapolis etc. R. Co.*, 98 Wis. 624, 74 N. W. 561, 67 Am. St. 830, 40 L. R. A. 457; *Union Pac. R. Co. v. Fickenscher* (Neb.), 100 N. W. 207; *Bates County Bank v. Missouri Pac. R. Co.*, 98 Mo. App. 330, 73 S. W. 286; *Stone v. Boston etc. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Denver etc. R. Co. v. Morton*, 3 Colo. App. 155, 32 Pac. 345; *Peck v. Missouri Pac. R. Co.*, 31 Mo. App. 123; *Missouri Pac. R. Co. v. Cullers*, 81 Tex. 382, 17 S. W. 19, 13 L. R. A. 542; 3 Elliott, Railroads, § 1243. The intervening causes of back fires, winds, etc., preclude a recovery. *Megow v. Chicago etc. R. Co.*, 86 Wis. 466, 56 N. W. 1099; *Marrin v. Chicago etc. R. Co.*, 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506; *Pennsylvania Company v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71; 13 Am. & Eng. Ency. Law (2d ed.), 456-459; *Toledo etc. R. Co. v. Muthersbaugh*, 71 Ill. 572; Elliott, Railroads, § 1231; *Doggett v. Richmond etc. R. Co.*, 78 N. C. 305.

Boyle & Warburton, for respondent, cited: 13 Am. & Eng. Ency. Law (2d ed.), pages, 442, 443, 457, 465, 498, 502, 503; *Noland v. Great Northern R. Co.*, 31 Wash. 430, 71 Pac. 1098.

RUDKIN, J.—This action was brought to recover damages for the destruction of personal property by fire. The complaint contained the following allegations of negligence on the part of the defendant: Negligence in failing to provide proper spark arresters for its locomotives; negligence in suffering combustible material to accumulate on its right of way; and negligence in suffering fire to spread from its right of way to the adjoining lands of plaintiff, whereby his property was destroyed. From a judgment in favor of the plaintiff, the defendant has appealed.

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The first assignment of error is that the respondent wholly failed to prove the origin of the fire that destroyed his property, and therefore the court should have directed a judgment in favor of appellant. The court instructed the jury, that negligence could not be presumed; that they should not find for the respondent on mere surmise or on speculative grounds; that mere suspicion that the fire which caused the damage originated from the appellant's locomotives was not enough, and that it must be proved as a fact, disregarding surmises and guesses. Under these instructions the jury returned a verdict in favor of the respondent, and the trial court refused to set that verdict aside. We agree with counsel for appellant that, in cases such as this, the origin of the fire must be established by reasonable affirmative evidence and to a reasonable certainty, but under this rule we would not be warranted in interfering with the verdict in this case. While the testimony tended to show the existence of a number of fires in the vicinity of the respondent's property on the day of its destruction, yet we think the destruction of the property was traced with reasonable certainty to a fire started on the west side of the track some four days before, and that such fire originated from a locomotive on the appellant's road.

The next contention is that there were intervening causes which exempted appellant from liability, assuming that it was negligent in the first instance. In so far as other fires are relied upon as intervening causes, they have been eliminated from the case by the verdict of the jury, under competent testimony. In so far as the wind was relied upon as an intervening cause, we doubt if any such wind was shown to exist on the day in question as would constitute an intervening cause, within the rule contended for by counsel. But, in any event, that question was submitted to the jury under proper instructions, and their verdict is binding upon this court. The motion for a nonsuit was properly denied.

The next error assigned is to the following instruction:

"It is also the duty of the defendant company to use reasonable care to arrest the spread of fires which have been communicated from its locomotives *or which have been otherwise set upon its right of way*, and to use reasonable efforts to extinguish fires set by its locomotives or spread from its right of way *after such fires have reached the premises of others.*"

The appellant contends that the italicized portion of the above instruction would warrant a recovery against it for failure to extinguish fires on its right of way, regardless of the source or origin of the fire. If this instruction stood alone, there would be force in the appellant's contention. But the court further instructed the jury as follows:

"You will not find for plaintiff unless you find that the fire which burned Mr. Wick's property, if any, originated from the defendant, and that the defendant was guilty of some negligence which proximately started the fire or permitted it to spread."

Taking these two instructions together, we do not think that the jury could have been misled. Taking the instructions as a whole, they were favorable to the appellant throughout, and no error can be predicated thereon.

The last assignment is that the title to a portion of the wood destroyed was not in the respondent at the time of its destruction. The court instructed the jury as follows:

"You are further instructed that, if you find that the title to the wood cut by Brown at his place under the contract did not pass to Wick until it had been measured up, the plaintiff cannot recover, therefore, for any wood cut by Mr. Brown or by Brown's men, unless such wood had been measured at the time of the fire."

There is nothing in the record to indicate that the jury did not follow this instruction. In fact, the contrary fairly appears.

Finding no error in the record, the judgment is affirmed.

MOUNT, C. J., DUNBAR, ROOT, CROW, HADLEY, and FULLERTON, JJ., concur.

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Opinion Per Curiam.

[No. 5912. Decided October 20, 1905.]

THE STATE OF WASHINGTON, *on the Relation of N. G. Wheeler et al., Plaintiff, v. MASON IRWIN, as Judge of the Superior Court for Chehalis County, Respondent.*¹

MANDAMUS — APPEAL — SUPERSEDEAS — DESTRUCTION OF PROPERTY PENDING HEARING. Upon an appeal from an order dissolving an injunction against the threatened destruction of buildings, a writ of mandate to compel the lower court to fix the amount of the bond will be denied where the property was destroyed before the hearing.

Application filed in the supreme court October 11, 1905, for a writ of mandate to compel the superior court for Chehalis county, Irwin, J., to fix the amount of a supersedeas bond, upon an appeal from an order dissolving a temporary restraining order. Writ denied.

J. C. Cross, for relator.

John C. Hogan, for respondent.

PER CURIAM—Original application for mandamus to compel the lower court to fix a supersedeas bond on appeal.

In August, 1905, relators brought an action in the superior court of Chehalis county, to restrain the city of Aberdeen from destroying certain wooden buildings within the fire limits of said city. A temporary restraining order was issued, pending the trial of the cause in the court below. At the final hearing, the trial court found against the plaintiffs, and entered an order dissolving the restraining order theretofore issued, and dismissing the action. Plaintiffs thereupon gave notice of appeal to this court, and requested the trial court to fix the amount of the supersedeas bond on appeal. The trial court refused this request. Thereupon this application for mandamus was filed in this court. A show cause order was issued. Upon return to this order, it

¹Reported in 82 Pac. 420.

appears that the city of Aberdeen had destroyed the buildings before the service of the show cause order, and that there is nothing now upon which the supersedeas may operate. For this reason the writ is denied, without costs to either party.

[No. 5680. Decided October 21, 1905.]

R. MADSON *et al.*, Respondents, v. SPOKANE VALLEY LAND AND WATER COMPANY, Appellant.¹

WATERS — IRRIGATION — WRONGFUL DIVERSION — ESTOPPEL OF LITTORAL PROPRIETOR—FAILURE TO OBJECT TO OPERATIONS ON LANDS OF OTHERS. The fact that a littoral proprietor upon the arm of a lake stood by without objection during the construction of a dam for irrigation purposes, erected at great expense, cutting off his property from the main body of the lake and draining his premises, would not amount to an estoppel preventing him from objecting to the diversion of the waters by the closing of head gates so as to leave no water on his premises, where no act was done or admission made intended to influence or encourage the construction, which was entirely upon the lands of others.

NAVIGABLE WATERS—WHAT ARE. A small lake of the average depth of eighteen feet, having no navigable inlet or outlet, upon which a small steamer is run for hire during the camping season, is navigable within, Const., art. 17, § 1.

SAME—TITLE BY PATENT PRIOR TO ADOPTION OF STATE CONSTITUTION—LITTORAL RIGHTS. The vested rights of a littoral owner upon a navigable lake, under a patent issued prior to the adoption of the state constitution, to the uninterrupted use of the water in its natural flow or condition, continues unimpaired by the constitution, and cannot be divested except under the power of eminent domain upon the making of compensation; and it is immaterial whether the water flowed from, or stood upon, the land.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 30, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, enjoining the diversion of waters

¹Reported in 82 Pac. 718.

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and the use of a dam by an irrigation company, and directing the commencement of proceedings to condemn plaintiffs' littoral rights within sixty days. Affirmed.

James T. Burcham and *Happy & Hindman*, for appellant.
Gallagher & Thayer, for respondents.

MOUNT, C. J.—This action was begun by respondents, to recover damages and to restrain the appellant from maintaining a dam across an arm of Liberty lake in Spokane county. On the trial of the case, the court below entered an order enjoining the use of the dam, and directing appellant within sixty days to commence an action for the condemnation of respondents' littoral rights in and about the arm of the said lake extending upon the respondents' premises. From that order, this appeal is prosecuted.

The facts agreed to upon the trial are substantially as follows: Liberty lake is a body of water averaging about three-fourths of a mile in width, about one and three-fourths miles in length, and of an average depth of eighteen feet. There is no navigable inlet or outlet to this lake. To the northwest from the main body of the lake, an arm of the lake extends over and across lands owned by respondents. These lands were acquired by a patent from the United States in October, 1886, before the adoption of the state constitution. No part of this arm of the lake lying upon respondents' land has ever been navigable for any purpose. The appellant, or its predecessors in interest, in the year 1899, entered upon the arm of the lake to the east of respondents' lands, between said lands and the main body of the lake, and constructed a dam across said arm and erected head gates therein, and to the west of respondents' lands constructed a canal from the arm of the lake to lands to be irrigated. The effect of the dam and the said canal is to withdraw the water of Liberty lake entirely from respondents' premises, so that respondents' access to the water on their land has been entirely destroyed, except for water which

is permitted to run through the head gates during the irrigating season. The said dam and canal of the appellant were completed in the spring of the year 1903. In constructing said dam and canal and head gates, the appellant spent large sums of money, aggregating about \$50,000. The respondents had knowledge that appellant was doing said work and, after the completion thereof, respondents, in the year 1904, cultivated three acres of the land drained by said canal. The appellant and its predecessors in interest have, at all times herein mentioned, been an irrigation company, under the laws of this state, and have appropriated the waters of Liberty lake for purposes of irrigation, and have actually been furnishing water for irrigation of lands since 1901. It is now under contract to furnish water for irrigating six hundred and forty acres.

Appellant makes two contentions upon this appeal, as follows: (1) That respondents by their conduct have lost all right to any relief on the ground of estoppel, or, if not to all relief, at least to injunctive relief, and on this last assumption should have been granted only damages for trespass; (2) that, under the laws of this state, the respondents have no legal right to have the waters of Liberty lake remain in their natural condition, and hence any harm they may have suffered by the withdrawal of the water from their riparian land was *damnum absque injuria*.

Upon the first question, the only facts which in any manner tended to create an estoppel are that the respondents knew that appellant was building the dam, and constructing the head gates and canal, and expending large amounts of money, and that the next year after the works were completed respondents cultivated about three acres of the land drained by said canal. None of the work of building the dam or head gates or canal was upon respondents' lands and it is not shown that respondents knew that these structures would entirely drain the water from their lands. It is fair to presume, in the absence of such showing, that respondents

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supposed the head gates were so arranged, or would be so arranged, as to leave the water upon their lands in its natural condition and work no damage to respondents. This court, in *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425, in discussing this question, quoted with approval the definition of estoppel as laid down in *New York Rubber Co. v. Rothery*, 107 N. Y. 310, 14 N. E. 269, as follows:

“To constitute it [an estoppel] the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct.”

None of the elements of estoppel, as thus defined, are found in this case. Respondents are not shown to have done any act, or made any admission, which influenced, or was intended to influence, the appellant to construct the dam or head gates or canal where they were constructed. If the work had been done upon respondents' lands, and they had stood by and encouraged the same by making no objections thereto, a different condition would have existed; but the work was done upon lands belonging to others, where respondents had no right to object, and where appellant no doubt had a right to be. The mere fact that respondents knew that appellant was constructing its dam, ditches, and head gates, was no notice to the respondents that appellant would damage or take lands for the purpose of using such improvements without first paying for such damages or lands. The case of *Rigney v. Tacoma Light & Water Co.*, *supra*, fully discusses the point here made, and is decisive of this case upon the question. The fact that respondents, after the damage had been done, attempted to utilize a part of the land, did not amount to a waiver of their right to maintain the action.

The ground of the second contention is, that Liberty lake is a navigable lake, the title to which is in the state, and that, by the laws of this state, littoral owners on navigable waters of the state have no legal rights to those waters, as an incident to their estate; that, although this arm of the lake which extends across respondents' land is not navigable, the same rules must be applied as if the respondents' lands abutted on that part of the lake which is navigable. In reference to the navigability of the lake proper, the following facts were stipulated:

"That the lake mentioned in the pleadings as Liberty lake is a body of water of the average width of about three-fourths of a mile, and the lake being about a mile and three-fourths in length and of an average depth of eighteen feet last year. That for several years last past there has been running on said lake a pleasure steamer that will carry about fifty passengers, and that said passengers are carried for hire during the camping season, said boat being propelled by steam. There are no cities or villages upon the lake, and the lake has never been used for business or commercial purposes, except as above stated, and there is no navigable inlet or outlet to the lake. That there is one hotel upon the east side of said lake, and one hotel on the west side of said lake, and one store, a general merchandise store, on the north side of said lake, being a small grocery store. The hotels are open only during the camping season in the summer."

There can be no reasonable doubt that this lake, as above described, is navigable in fact and falls within the provisions of § 1, art. 17, of the state constitution; but, in our opinion, the fact that the lake is a navigable body of water makes no material difference in this case. The title of respondents to their land was acquired from the United States prior to the adoption of the state constitution, which reserves the vested rights of the respondents. The irrigation act, under which appellant was organized, also provides that the right to take water for irrigation is "subject to rights existing at the time of the adoption of the constitution of this state." Laws 1899, p. 261. When it is conceded, as it is in this case, that

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the respondents were in possession of the land, holding patent from the United States prior to the adoption of the constitution, the littoral or riparian rights which respondents then enjoyed continued thereafter unimpaired. These rights are presumed to be valuable rights. They may have been the principal considerations for the purchase of the land from the government. These rights can only be taken away when necessary for a public use, upon due consideration. This point in this case is fully covered in *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190, where this court said:

“The right of the state over the waters of Lake Whatcom is such as pertains to sovereignty alone. That is the right to use, regulate, and control these waters as a common highway for commerce, trade, and intercourse, and to grant the soil in the bed of the lake, so that it might become private property, subject to the paramount right of public use for navigation. In short, that the rights of the state in the navigable waters thereof are the same rights as pertained to the sovereign at common law in the sea, its bays, arms, and inlets. But conceding that by art. 17, § 1, of the constitution absolute ownership is now in the state, so that the state can dispose of the waters as well as the soil, the vested rights of the respondent, notwithstanding, are preserved to it. That is the right to the use of the water in its natural flow as it existed before the adoption of the constitution, when the United States granted to Russell V. Peabody, under the ‘Donation Act’ the land over which Whatcom creek flows, of which the lands of the respondent are a part. The constitution having reserved to the respondent its vested rights, the legislature, except under the power of eminent domain, upon making compensation, could not divest it of that right, either directly or indirectly, for a public or private use.”

The case from which this quotation is made is similar in all essential particulars to the case before us, and is in point. The principal difference in the two cases is that in this case the water which stood upon respondents’ land is an arm of the lake without a natural outlet, while in the *New Whatcom* case the water flowed from the land in a natural stream over

respondent's land. But the rights of the respondents in both of the cases are identical, viz., the uninterrupted use of the water in its natural flow or condition upon his land.

Under these considerations, the judgment of the lower court was right, and is affirmed.

DUNBAR, HADLEY, CROW, ROOT, and RUDKIN, JJ., concur.

FULLERTON, J., took no part.

[No. 5872. Decided October 25, 1905.]

CHARLES HELM *et al.*, Respondents, v. ALEX JOHNSON *et al.*,
*Appellants.*¹

EJECTMENT—TITLE—TRACING TO RELIABLE SOURCE—FINDINGS—EVIDENCE—SUFFICIENCY. A decree of distribution of an escheated estate, with a deed from the county, does not show sufficient title in the plaintiff to maintain an action of ejectment, where the title of the deceased was not traced to the government, a grantor in possession, or a common source of title; since such distribution does not convey a warranted title but only such interest as the deceased had.

EJECTMENT—TITLE OF PLAINTIFF. In ejectment, plaintiff must recover, if at all, upon the strength of his own title.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered April 26, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action of ejectment. Reversed.

Eric Edw. Rosling, for appellants. In ejectment plaintiff must trace his title back to the government, a grantor in possession, or to a common source of title. 10 Am. & Eng. Ency. Law (2d ed.), 484; 15 Cyc. 39; *Ronk v. Higginbotham*, 54 W. Va. 137, 46 S. E. 128; *Jackson Lumber Co. v. McCreary*, 137 Ala. 278, 34 South. 850; *Slauson v. Goodrich Transp. Co.*, 99 Wis. 20, 74 N. W. 574, 40 L. R. A. 825;

¹Reported in 82 Pac. 402.

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Troth v. Smith, 68 N. J. L. 36, 52 Atl. 243. If plaintiff fails to do this he cannot recover, and defendant cannot be required to defend his possession. *Hillman v. White*, 19 Ky. Law 1682, 44 S. W. 111; *Muhlenberg v. Druckenmiller*, 103 Pa. St. 631. One break in plaintiff's chain of title defeats his action. *Alabama Mineral Land Co. v. Baker*, 119 Ala. 351, 24 South. 706. The respondent must recover, if at all, on the strength of his own title, and not on the weakness of that of appellants. *Humphries v. Sorenson*, 33 Wash. 563, 74 Pac. 690; *Pacific Bank v. Hannah*, 90 Fed. 72.

Harvey L. Johnson and *F. S. Blattner* (*Ernest M. Card*, of counsel), for respondents. The deed from Pierce county is in itself sufficient to establish *prima facie* evidence of title in said respondents. *Holloran v. Meisel*, 87 Va. 398, 13 S. E. 33; *Kendrick v. Latham*, 25 Fla. 819, 6 South. 871; 1 Am. & Eng. Ency. Law (2d ed.), 484, and cases cited.

DUNBAR, J.—Action in ejectment. The complaint alleged that the plaintiffs acquired title to the tract of land in dispute by virtue of two deeds—one, a quit-claim deed, executed March 27, 1901, by Martin L. Dale and Emma R. Dale, husband and wife, and the other executed on the 27th day of April, 1902, by John B. Reed, treasurer of Pierce county, Washington; alleged wrongful possession on the part of the defendants; and demanded judgment for the restitution of the possession, and the sum of \$200. The answer denied the allegations of the complaint, and alleged adverse possession for a period of more than ten years immediately preceding the commencement of the action. This possession was denied by the reply, and upon these issues the cause went to trial.

The court, after finding some preliminary and undisputed facts, found that the plaintiffs had purchased the property from the county of Pierce, for a valuable consideration, at the time alleged in the complaint; that the proof consisted of the deed from Dale and wife, a deed from the county of

Pierce, as alleged in the complaint, and also a decree of distribution in the estate of one Luviney, who was the alleged owner of the land in dispute and whose estate, including this land, escheated to the state, and that no other muniments of title had been offered in evidence; that the defendants had entered into, and taken possession of, the land about the year 1891, and had maintained possession of said premises ever since, under a claim of right; and that they are now, and for more than ten years have been, in the actual, visible, open, exclusive, continuous, uninterrupted, and notorious possession thereof under said claim of right. Upon these findings of fact, the conclusions of law were, that the defendants wrongfully and unlawfully withheld the possession of said land from the plaintiffs, and that plaintiffs were entitled to the possession of said tract, and to a decree of the court awarding possession thereof, together with costs and disbursements.

At the threshold of this case it appears affirmatively from the findings of fact that no title to the land in dispute was shown by the plaintiffs. There was no attempt to show title in Dale and wife. The distribution of an estate that has escheated does not convey a warranted title, any more than the distribution of any other estate. All the distribution amounts to in any case is a conveyance from the deceased to the distributee, who manifestly gets no better title than the deceased had; and, the title of the deceased not having been traced to the government, a grantor in possession, or a common source of title, no title was shown in the plaintiffs, and it is too elementary to warrant the citation of authorities that, in an action of ejectment, the plaintiff must recover on the strength of his own title, and not upon the weakness of the claim of his adversary. It is therefore not necessary to discuss the question of adverse possession.

The judgment is reversed.

MOUNT, C. J., HADLEY, RUDKIN, CROW, and ROOT, JJ., concur.

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FULLERTON, J. (concurring)—I think the findings of the court show title in the appellants by adverse possession, and for this reason I concur in the judgment directed by the majority. On the question of the respondents' title I express no opinion.

[No. 5685. Decided October 25, 1905.]

R. A. WINSOR, *Respondent*, v. NELS HANSON, *Appellant*.¹

NUISANCE — ABATEMENT — BOOM ACROSS STREAM — EVIDENCE — ADMISSIBILITY. In an action to enjoin the removal of a boom placed across a stream on the plaintiff's land for the purpose of preventing drift wood from injuring his premises, evidence as to the practicability of the plaintiff's plan is immaterial.

SAME—REMOVAL BY FLOOD PENDING ACTION—SUBJECT-MATTER OF CONTROVERSY. In an action to enjoin the removal of a boom placed across a stream on the plaintiff's lands, in which the defendant files a cross-complaint for an injunction against the obstruction of the stream, the fact that the boom was carried away by high water between the commencement of the action and the time of trial does not warrant a dismissal because of cessation of the controversy; since the subject-matter of the action was not the particular boom but the right of the plaintiff to obstruct the stream.

SAME—ISSUES—NAVIGABILITY OF STREAM. In an action to enjoin the removal by an upper proprietor of a boom placed across the stream on the plaintiff's lands, the navigability of the stream is no defense to the action, when it has not been placed in issue by the pleadings and there is no attempt to justify its removal upon that ground.

SAME—ABATEMENT BY ACT OF PARTY—JUSTIFICATION—INJUNCTION. A proprietor is not justified in entering upon adjoining lands to abate a nuisance by the removal of a boom placed across the stream, where it has caused him no injury, and merely because of a probability that it will create a nuisance in the future; nor will injunction lie against such an obstruction where the apprehended damage by the backing up of water is merely problematical.

SAME—DISMISSAL OF CROSS-COMPLAINT—WITHOUT PREJUDICE. In an action to enjoin the removal of a boom placed across a stream,

¹Reported in 82 Pac. 710.

a dismissal of a cross-complaint to enjoin the obstruction as a nuisance should be without prejudice, where there is proof that no present injury had been done and injury in the future was merely problematical.

Appeal from a judgment of the superior court for Mason county, Linn, J., entered July 8, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, enjoining the removal of a boom across a stream, and dismissing a cross-complaint for an injunction restraining the obstruction of the stream. Modified.

L. R. Byrne and Troy & Falknor, for appellant.

T. P. Fisk, for respondent.

RUDKIN, J.—The plaintiff is an owner of a tract of land in Mason county, in this state. The defendant is the owner of a tract of land adjoining the land of the plaintiff on the north. A certain stream, called "Dry Bed," flows in a southerly direction, immediately east of the land owned by the defendant, and through the land owned by the plaintiff. The stream is practically dry during the summer months, but during the rainy season it flows a large volume of water, and brings down considerable quantities of drift wood, which forms in jams and spreads out over the adjacent lands. Some time prior to the commencement of this action, the plaintiff placed a boom across the stream on his own land, at a point about three hundred feet below the defendant's land. His ostensible purpose in constructing this boom was to intercept the drift at that point, so that the same could be removed and burned, thus preventing it from injuring the meadow land owned by the plaintiff at points lower down the stream. The object the plaintiff may have had in view is only material in so far as it tends to explain his motives.

Prior to the commencement of this action, the defendant entered upon the land owned by the plaintiff, and destroyed the boom placed across the stream, and claims the right so to do, and threatens to continue to enter upon the plaintiff's

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land and remove all obstructions placed in the stream, unless enjoined from so doing. The defendant bases his right to remove the obstructions on the ground that such obstructions will cause the waters of the stream to back up and overflow his land to his great damage and injury, that the acts of the plaintiff in obstructing the stream constitute a nuisance which he has the right to abate. The plaintiff brought this action for an injunction to restrain the defendant from removing the obstruction which he had placed in the stream. The defendant in his answer justified his acts on the grounds above stated, and filed a cross-complaint for an injunction restraining the plaintiff from obstructing the stream in the manner indicated. At the trial the court granted an injunction, as prayed by the plaintiff, and dismissed the cross-complaint of the defendant. From this judgment the defendant appeals.

The first assignment of error relates to the admission of testimony tending to show the practicability of intercepting and consuming the drift wood at the point in question. As stated above, the object the respondent may have had in view, and the practicability of his scheme, has no bearing upon the merits of the case. The ultimate question for consideration is, the effect, if any, which the obstruction of the stream at this point will have upon the lands of the appellant. This is an equity case, however, and all improper testimony will be disregarded by this court.

The next contention is that the court should have dismissed the action because the controversy had ceased. The basis of this contention is that the boom placed in the stream by the respondent was carried out by high water between the time of commencement of this action and the trial. This particular boom was not the subject-matter of the controversy. The respondent insisted upon his right to obstruct the stream at a point on his own land, and the appellant insisted on his right to enter upon the respondent's land and remove the obstruction. This was the controversy between

the parties and this controversy remained, notwithstanding one obstruction placed in the stream may have been carried away by the floods. The motion was properly denied.

The next contention is that the stream is navigable, and that the appellant has the right to remove obstructions therefrom. It is a sufficient answer to this to say that no such question is suggested by the pleadings. Furthermore the stream has never been used for purposes of navigation, and is not now so used. Conceding that it is navigable, which we do not, the title to the shores and bed of the stream is in the respondent, subject to the right of navigation. The appellant only has the right to remove such obstructions as interfere with his rights of navigation, and there is no pretense that he was justified on that ground.

The main question in the case is, did the appellant show a sufficient justification for his acts. We are satisfied that he did not. The right of the appellant to abate a nuisance which is especially injurious to him is not denied; but,

“The person who abates a nuisance, either public or private, acts at his own peril. He takes upon himself by his act the risk of being able to show, on a proper action by the party whose interests are affected by the abatement, that the thing abated was a nuisance. It must be a nuisance actually existing at the time, and not one that has been discontinued or that is apprehended merely.” 1 Am. & Eng. Ency. Law (2d ed.), 82.

It is not claimed that the obstruction constituted a nuisance at the time the appellant entered the close of the respondent and removed the same. The utmost that can be claimed in favor of the appellant is that there is a probability that the obstruction of the stream will, sooner or later, create a nuisance. For this reason the court properly enjoined the appellant from removing the obstructions placed in the stream on the respondent's land. For the same reason the court properly denied the prayer of the cross-complaint.

“Ordinarily an injunction will be granted when the act or thing threatened or apprehended is a nuisance *per se*, or

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will necessarily become a nuisance, and will be denied when it may or may not become a nuisance, according to circumstances, or when the injury apprehended is doubtful, contingent, or eventual, merely." 21 Am. & Eng. Ency. Law (2d ed.), 704.

This case falls within the latter class. The apprehended damage is problematical to say the least. The results which may ultimately flow from the obstruction of the stream cannot, in the nature of things, be determined or adjudicated at this time. The respondent, however, has no right to place obstructions in the stream which will cause the water to back up and overflow the land of the appellant to his injury, and should the obstruction which he proposes to place in the stream bring about such a result in the future, the appellant will have a right of action therefor, which should not be cut off on the record before us. For that reason the cross-complaint of the defendant should be dismissed without prejudice to a new action whenever his rights are invaded. The judgment appealed from is modified to that extent, and, as thus modified, the judgment is affirmed. The respondent will recover costs in this court.

MOUNT, C. J., DUNBAR, HADLEY, FULLERTON, CROW, and ROOT, JJ., concur.

[No. 5797. Decided October 30, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM
WHITE, *Appellant*.¹

APPEAL—EXTENDING TIME FOR TAKING—STATEMENT OF FACTS—
TIME FOR FILING—EXTENDING BEYOND NINETY DAYS. The courts have
no power, even in a capital case, to extend the time for taking an
appeal from a final judgment or for proposing a statement of facts,
beyond ninety days from the date of rendition of the judgment, as
required by the provisions of the statute, which are mandatory.

SAME—FAILURE TO FILE TRANSCRIPT, STATEMENT OF FACTS, AND
BRIEFS—DISMISSAL. An appeal, even in a capital case, must be dis-
missed, where no transcript, statement of facts, or briefs are filed,
and there is no error in the record subject to review.

Motion to dismiss an appeal from a judgment of the su-
perior court for King county, Griffin, J., entered March 17,
1905, upon a conviction of murder, and an application to
the supreme court, upon the hearing of such motion, for a
writ of mandamus to compel the superior court to extend the
time for taking an appeal, and to direct the preparation of
a statement of facts at public expense. Writ denied. Appeal
dismissed.

William O'Connor and *A. A. Booth*, for appellant.

Kenneth Mackintosh, for respondent.

RUDKIN, J.—The defendant was informed against in the
court below for the crime of murder in the first degree, and
upon his trial the jury returned a verdict of guilty as charged.
Final judgment was entered on the 17th day of March, 1905,
and on the same day the defendant gave notice of appeal to
this court.

On the 15th day of June, 1905, the appellant made appli-
cation to the court below for an order extending the time
in which to appeal from the judgment, for a period of thirty
days, for the reason that he had not the necessary means to

¹Reported in 82 Pac. 743.

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procure a transcript of the record on appeal. This application was supported by two affidavits. In the first, the appellant averred that he had been unable to procure a transcript of the record by reason of his poverty, but, if an extension of thirty days were granted, he would be able to procure the necessary funds to perfect his appeal. In the second, he averred that he was without means to procure a transcript of the stenographer's notes of the testimony taken at the trial in order that he might prepare and serve a proposed statement of facts or bill of exceptions, and asked that the court require the stenographer to furnish the same at public expense. These applications were denied by the court on the same day.

On the 15th day of August, 1905, the state filed a short record here, and moved to dismiss the appeal, for the reasons, that no statement of facts or bill of exceptions had been filed or served; that no transcript of the record on appeal had been filed in the court below, or in this court; and that no briefs on appeal had been filed or served. The appellant appeared at the hearing of this motion, and filed a counter application for a writ of mandamus directing the court below, in effect, to grant the application which it had theretofore denied as above stated. By consent of parties, both motions were heard together. We will first consider the application for the writ of mandate.

It will be seen from the foregoing statement that the application made to the court below was, first, for an order extending the time in which to prosecute an appeal for the period of thirty days, and second, for an order requiring the stenographer to furnish a proposed statement of facts or bill of exceptions at public expense. In support of his application for the writ, the appellant earnestly insists that he has a constitutional right to appeal from the judgment against him, and that such right cannot be impaired or forfeited by reason of his poverty. The right of appeal in such cases is no doubt guaranteed by the constitution, but the procedure

on appeal is entirely statutory, and this court is powerless to grant relief against a failure to comply with the mandatory requirements of the statutes governing appeals. Two of these mandatory requirements are, that an appeal from a final judgment must be taken within ninety days from the date of rendition, and that the time for filing and serving a proposed statement of facts or bill of exceptions cannot be extended beyond ninety days from the entry of the judgment or order appealed from. *State v. Seaton*, 26 Wash. 305, 66 Pac. 397, and cases cited.

The application presented to the court below was styled, "An application to extend the time in which to take an appeal." Such relief the court was powerless to grant. If it were intended as an application for an extension of the time for filing and serving a bill of exceptions or statement of facts, the court was equally powerless, as the application was not made until the ninetieth day after the rendition of the final judgment. It would have been futile for the court below to require the state to furnish a proposed statement of facts to be filed more than ninety days after the entry of the judgment appealed from, and it would be equally futile for this court to make such an order now. We are not called upon to decide whether a court should compel the state to furnish a statement of facts on appeal, in any case or under any circumstances. The application for the writ is therefore denied.

This court would not dismiss an appeal in a capital case for failure to file a transcript or serve briefs, where the omission could be supplied; but it is conceded that there is no error in the record subject to review in this court, in the absence of a bill of exceptions or statement of facts, and such omission cannot be supplied at this time. The motion to dismiss and affirm must, therefore, be granted, and it is so ordered.

MOUNT, C. J., DUNBAR, CROW, FULLERTON, HADLEY, and ROOT, JJ., concur.

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Syllabus.

[No. 5747. Decided October 31, 1905.]

NELLIE BENNETT, *Respondent*, v. SUPREME TENT OF THE
KNIGHTS OF THE MACCABEES OF THE WORLD,
Appellant.¹

APPEAL — STATEMENT OF FACTS — NOTICE OF FILING — STATUTE — CONSTRUCTION. Under Bal. Code, § 5058, upon service of a proposed statement of facts upon the adverse party, notice of the filing also is not necessary, except upon the other parties appearing.

PROCESS—SUMMONS—PERSONAL SERVICE—BY MAIL—VALIDITY. Bal. Code, § 4893, inferentially forbids service of summons by mail, and a service upon the statutory agent of a foreign corporation by mail is insufficient.

SAME—FOREIGN INSURANCE COMPANY—SERVICE UPON—INSURANCE COMMISSIONER STATUTORY AGENT—POWER TO ADMIT SERVICE. Under Laws 1901, p. 360, requiring foreign benefit insurance associations to appoint the state insurance commissioner its attorney in fact, upon whom service of process may be made with the same legal effect as if made upon the association, such an appointment does not authorize the commissioner to admit or waive service, where no legal service has in fact been made.

SAME — DEPUTY INSURANCE COMMISSIONER — SERVICE UPON — VALIDITY. An appointment of the insurance commissioner and his successors in office as the statutory agent of a foreign corporation for the purpose of service of process, pursuant to Laws 1901, p. 360, does not authorize the deputy insurance commissioner to receive service, as the power is derived from the appointment and does not pertain to the office.

SAME—INVALID SERVICE—ACTUAL NOTICE OF ACTION—SUFFICIENCY. A court cannot acquire jurisdiction of the person of a defendant who was not served with process, and made no appearance, by reason of his having actual knowledge of the suit.

APPEARANCE—GENERAL—BY MOTION TO VACATE VOID JUDGMENT—EFFECT—JURISDICTION—WAIVER. A general appearance in support of a motion to set aside a void judgment, does not validate the judgment or waive the question of jurisdiction.

JUDGMENT — VACATION — MERITORIOUS DEFENSE. An affidavit of merits is not necessary upon a motion by defendant to set aside a void default judgment.

¹Reported in 82 Pac. 744.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered March 4, 1905, in favor of plaintiff upon the defendant's default, in an action on a benefit certificate, and from an order entered March 13, 1905, denying a motion to vacate the default and judgment. Reversed.

A. R. Titlow and Jesse Thomas, for appellant.

H. W. Lueders and John C. Stallcup, for respondent.

RUDKIN, J.—The defendant is a benefit association organized and existing under the laws of the state of Michigan, and having its principal office in that state. This action was brought to recover the amount of a benefit certificate issued by the association to one Ruel F. Bennett, and made payable to the plaintiff, as his widow, in the event of his death. Judgment was rendered by default against the defendant on the 4th day of March, 1905, and on the 6th day of March, 1905, the defendant moved to vacate the judgment, and for leave to answer, on the following grounds: (1) Inadvertence, surprise, and excusable neglect; (2) irregularity in obtaining the judgment; and (3) want of jurisdiction over the person of the defendant. The motion was denied, and this appeal is prosecuted from the final judgment and from the order denying the motion to vacate.

Before passing to the merits, the respondent moves to strike the statement of facts for the reason that no notice of the filing and service of the proposed statement was ever served on the respondent or her attorney. The statute provides, Bal. Code, § 5058, that the proposed statement of facts shall be filed and a copy thereof served on the adverse party, and also that notice of the filing of the proposed statement shall be served on all other parties who have appeared in the action. The respondent here was the adverse party, upon whom a copy of the proposed statement was served, and the law does not provide that she shall have other or further notice of the filing. Notice of the filing is only

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required to be served on such parties as are not served with a copy of the statement. The motion to strike is denied.

Had the court jurisdiction of the person of the appellant at the time of the rendition of the judgment appealed from? The facts in relation to the service of the summons are these. It appears from the affidavits filed in support of the motion to vacate, and inferentially from the proof of service itself, that two copies of the summons and complaint were forwarded by mail to the commissioner of insurance of this state, at his office in Olympia. One of these copies was thereafter returned to the attorneys for the respondent by the deputy insurance commissioner, with the following endorsement thereon: "I hereby certify that on this 10th day of February, A. D. 1905, I received at my office, in Olympia, a copy of the complaint and a copy of the summons in the case of Nellie Bennett vs. 'The Supreme Tent of the Knights of the Maccabees of the World.' That said copies are exact duplicates of the foregoing copy of summons and complaint. [Signed] Sam. H. Nichols, Insurance Commissioner. By J. H. Schively, Deputy Ins. Com'er." The respondent sought to acquire jurisdiction over the person of the appellant in this manner, by virtue of section 6 of the act of March 18, 1901, Laws 1901, p. 360. This section provides that each association, such as the appellant, admitted to do business in this state, and not having its principal office within the state, and not being organized under the laws of the state,

" . . . shall appoint, in writing, the commissioner of insurance and his successors in office to be its true and lawful attorney, upon whom all lawful process in any action or proceeding against it must be served, and in such writing shall agree that any lawful process against it which is served on said attorney, shall be of the same legal force and validity as if served upon the association, and that the authority shall continue in force so long as any liability remains outstanding in this state."

The appellant claims that the service of summons in question was void for the following reasons: (1) Because the alleged service was by mail; (2) because the statutory agent cannot accept, admit, or waive, service; (3) because service cannot be made on the deputy of the statutory agent; and (4) because there is no competent proof of the appointment of the commissioner of insurance as statutory agent in the manner required by the above act.

Personal service of summons cannot be made by mail in this state. The statute not only fails to authorize it, but by implication forbids it. Bal. Code, § 4893, expressly provides that certain sections of the code, authorizing the service of notices and other papers by mail, do not apply to the service of a summons or other process, or of any paper to bring a party into contempt. See, *Savings Bank of St. Paul v. Authier*, 52 Minn. 98, 53 N. W. 812, where the statutes under consideration are identical with our own. Can the statutory agent admit or waive service of summons? The agency created by the act in question, and by the commission provided for therein, is a passive agency. To hold that such agent can admit or waive service of summons where no service has been in fact made, is to add materially to the powers conferred upon him by the statute and by his warrant of attorney. The insurance laws of New York are similar to our own on the question under consideration. In the case of *Farmer v. National Life Ass'n*, 50 Fed. 829, the superintendent of insurance, who was the statutory agent in that state, formally admitted service of a summons and complaint which he had received through the mail, as in this case. The court held, without an opinion, that such service was void. The syllabus of the case is as follows:

"The appointment of the state superintendent of insurance as the attorney of a nonresident insurance company for the purpose of receiving service of process, as required by laws New York 1884, c. 346, sec. 1, does not authorize him to accept service by mail, and such service is void."

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See, also, *New River Mineral Co. v. Seeley*, 120 Fed. 193. Nor in our opinion can the service be made on the deputy insurance commissioner. It was so held in the case of *Lonkey v. Keyes Silver Min. Co.*, 21 Nev. 312, 31 Pac. 57. The process is not served on the insurance commissioner by virtue of his office, nor does he derive his authority to bind the association from his office or from the laws of this state. His entire authority comes from the commission executed by the association, and the donee of the power in that instrument is the insurance commissioner and his successors in office. We do not think that such a commission confers any authority on the deputy of the insurance commissioner. The deputy may represent and act for his principal in all things appertaining to his office, but in our opinion this is not an official act. In *State v. Payne*, 6 Wash. 563, 34 Pac. 317, this court held that a statute designating the sheriff as one of the jury commissioners did not empower his deputy to act. In that case the court said:

"We apprehend, however, that the duties and powers of deputy sheriffs mentioned in § 80 are such only as are usually incident to the office of sheriff, and are to be performed by him in his official capacity as sheriff, and do not include the execution of duties which are unofficial in character, and which may by law be performed as well by any other county officer who may be properly requested to perform them. The sheriff is designated by the legislature to perform, or assist in performing, the important duty of drawing the names of those who shall act as jurors, not because he is sheriff, but because he is deemed a proper person to execute a trust which must be confided to some one to perform."

We think the same rule applies here. For these reasons we are of opinion that there was no service of the summons in this case, and no valid waiver or admission of service. There was no appearance by the appellant, and the court was therefore without jurisdiction to render a judgment against it. We do not deem it necessary to consider or decide the formal sufficiency of the admission of service as above set

forth, or the competency of the proof as to the appointment of the statutory agent.

The respondent, on the other hand, contends that the appellant had at least actual notice of the commencement of the action. We cannot concede for a moment that a court can acquire jurisdiction of the person in that way. *Osborne & Co. v. Columbia County etc. Corp.*, 9 Wash. 666, 38 Pac. 160. It is next contended that the appellant appeared generally in its motion to vacate the judgment, and cannot now raise the question of jurisdiction. A party does not waive the question of jurisdiction, or validate a void judgment, by a general appearance in support of a motion to set the judgment aside. *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536. It is further contended that the application to set the judgment aside, and for leave to answer, does not disclose a meritorious defense. The authorities generally agree that no affidavit of merits is necessary in support of an application to set aside a judgment which is void for want of jurisdiction. 15 Ency. Plead. & Prac., 278, and cases cited. For the foregoing reasons the judgment is reversed and the cause remanded, with directions to set aside the default and permit the appellant to answer.

MOUNT, C. J., ROOT, FULLERTON, HADLEY, CROW, and DUNBAR, JJ., concur.

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[No. 5814. Decided October 31, 1905.]

THE STATE OF WASHINGTON, *on the Relation of James A.
Gorman et al., Plaintiff, v. SAM H. NICHOLS.
as Secretary of State, Defendant.*¹

CORPORATIONS—TRUST COMPANIES—ARTICLES OF INCORPORATION—COMPLIANCE WITH TRUST COMPANY ACT—CONSTRUCTION—RIGHT TO FILE. Under Laws 1903, p. 317, providing that thereafter no corporation shall be organized to carry on a trust business except under said act, a proposed corporation with powers confined almost wholly to an agency or trust business, with substantially the powers of a trust company, cannot be incorporated under Bal. Code, §§ 4250-4290, although the articles are drawn thereunder and do not follow the language of the act of 1903; or include all the powers of the latter act.

MANDAMUS—WHEN LIES—SECRETARY OF STATE—ILLEGAL ARTICLES OF INCORPORATION—FILING. The duties of the secretary of state are not ministerial to the extent of requiring him to file improper articles of incorporation and refer the matter to the attorney general for action; nor would the courts require the doing of a vain or illegal act.

Application filed in the supreme court, September 6, 1905, for a writ of mandamus to compel the secretary of state to file articles of incorporation. Writ denied.

Andrew J. Balliet and James Kiefer, for relators.

The Attorney General and A. J. Falknor, Assistant, for defendant.

MOUNT, C. J.—This is an original application for mandamus, to compel the secretary of state to file and record certain articles of incorporation. The relators, on August 24, 1905, subscribed and acknowledged articles of incorporation, and tendered the same with the proper fee therefor to be filed in the office of the secretary of state. This officer refused to file or record the said articles of incorporation in his office, for the reason that the powers of the corpora-

¹Reported in 82 Pac. 741.

tion as defined by its articles authorized a trust company business within the state, while the corporation was not organized as required by the act of 1903. Laws 1903, p. 367. The object and purposes of the proposed corporation are declared by its articles as follows:

"(1) To buy, sell, and deal in, both on its own account and as agent for any other corporation, firms or individuals, all kinds of real and personal property, and to engage in the making and securing of loans of money as broker or agent, and to deal in all kinds of investments, including promissory notes, bonds, municipal and other warrants.

"(2) To act as custodian, manager, or broker and sale and rental agent of real and personal or mixed property and estates, and to act as attorney in fact or agent for persons, firms, and corporations, in any lawful business or occupation.

"(3) To buy, acquire, hold, manage, operate, develop, improve, sell, mortgage, lease, exchange, maintain, and in any way dispose of real estate, including sites for manufacturing and milling plants, water works, water rights, mines, mining claims, electric light, gas or other light or power plants.

"(4) To borrow or raise money and to issue therefor its notes, bonds, or other evidences of indebtedness, and to secure the same by pledge, deed, mortgage, trust deed or any other form of hypothecation of any or all of its property, both real and personal.

"(5) To lend its money and to receive therefor notes, obligations, and other evidences of indebtedness as well as pledges, mortgages, hypothecations, and securities for its repayment.

"(6) To acquire, purchase, hold, and dispose of the business, books, stocks, bonds, contracts, certificates, and other property of any individual, firm, copartnership, or corporation.

"(7) To engage in the general brokerage and agency business, both as to real and personal property, and to charge and collect for its services rendered a compensation either by way of commissions, brokerage, or shares in the result or outcome of any transaction in which it may engage as such broker or agent, or which may be intrusted to it.

"(8) To exercise any and all powers and to do any and

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all lawful acts and things proper, expedient, or convenient for the carrying out of the purposes of this corporation in the state of Washington or elsewhere, where it may lawfully do the same or may acquire the right to do business."

It is conceded that the corporation is not formed under the act of 1903; but relators contend that they have organized under the general incorporation laws, as defined by Bal. Code, §§ 4250-4290, and that the powers of the corporation as defined by its articles do not conflict with the powers of trust companies as defined by the act of 1903. Under the general incorporation law, § 4250 *et seq.*, corporations may be formed for,

" . . . manufacturing, mining, milling, wharfing and docking, mechanical, banking, mercantile, improvement, and building purposes, or for the building, equipping, and managing water flumes for the transportation of wood and lumber, or for the purpose of building, equipping and running railroads, or constructing canals or irrigation canals, or engaging in any other species of trade or business."

When incorporated they shall have power:

"(1) To sue and be sued in any court having competent jurisdiction; (2) to make and use a common seal, and to alter the same at pleasure; (3) to purchase, hold, mortgage, sell, and convey real and personal property; (4) to appoint such officers, agents, and servants as the business of the corporation shall require, to define their powers, prescribe their duties, and fix their compensation; (5) to require of them such security as may be thought proper for the fulfillment of their duties, and to remove them at will; except that no trustee shall be removed from office unless by a vote of two-thirds of the stockholders, as hereinafter provided; (6) to make by-laws not inconsistent with the laws of this state or the United States; (7) the management of its property, the regulation of its affairs, the transfer of its stock, and for carrying on all kinds of business within the objects and purposes of the company as expressed in the articles of incorporation."

The act of 1903 provides for the incorporation of trust companies, and recites that, "Hereafter no corporation shall

be organized for the purpose of carrying on a trust company business in the state of Washington, except under this act." The powers of such companies are defined as follows:

"(1) To act as the fiscal or transfer agent of any state, municipality, body politic or corporation, and in such capacity to receive and disburse money.

"(2) To transfer, register, and countersign certificates of stock, bonds or other evidence of indebtedness, and to act as agent of any corporation, foreign or domestic, for any purpose now or hereafter required by statute or otherwise.

"(3) To receive deposits of trust moneys, securities and other personal property from any person or corporation, and to loan money on real or personal securities, and to discount and negotiate promissory notes, drafts, bills of exchange and other evidences of debt, and to buy, sell and exchange coin and bullion.

"(4) To lease, hold, purchase and convey any and all real property necessary for and convenient in the transaction of its business, or which the purposes of the corporation may require, or which it shall acquire in satisfaction or partial satisfaction of debts due the corporation under sales, judgments or mortgages, or in settlement or partial settlement of debts due the corporation from any of its debtors.

"(5) To act as trustee under any mortgage or bond issued by any municipality, body politic or corporation, and to accept and execute any other municipality or corporate trust not inconsistent with the laws of this state.

"(6) To accept trusts from, and execute trusts for, married women, in respect to their separate property, and to be their agent in the management of such property, or to transact any business in relation thereto.

"(7) To act, under the order or appointment of any court of record, as guardian, receiver or trustee of the estate of any minor, and as depository of any moneys paid into court, whether for the benefit of any such minor or other person, corporation or party.

"(8) To take, accept and execute any and all such legal trusts, duties and powers in regard to the holding, management and disposition of any estate, real or personal, and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by any court of record, or by any person, corporation, municipal or other authority, and it

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shall be accountable to all parties in interest for the faithful discharge of every such trust, duty or power which it may so accept.

“(9) To take, accept and execute any and all such trusts and powers of whatever nature or description as may be conferred upon or intrusted or committed to it by any person or persons, or any body politic, corporation or other authority, by grant, assignment, transfer, devise, bequest, or otherwise, or which may be intrusted or committed or transferred to it or vested in it by order of any court of record, and to receive and take and hold any property or estate, real or personal, which may be the subject of any such trust.

“(10) To purchase, invest in, and sell stocks, promissory notes, bills of exchange, bonds, debentures and mortgages and other securities; and when moneys or securities for moneys are borrowed or received on deposit, or for investment, the bonds or obligations of the company may be given therefor, but it shall have no right to issue bills to circulate as money.

“(11) To be appointed and accept the appointment of assignee or trustee under any assignment for the benefit of creditors of any debtor, made pursuant to any statute or otherwise.

“(12) To act under the order or appointment of any court of record or otherwise as receiver or trustee of the estate or property of any person, firm, association or corporation.

“(13) To be appointed and to accept the appointment of executor of, or trustee under, the last will and testament or administrator with or without the will annexed, of the estate of any deceased person, and to be appointed and to act as the guardian of the estate of lunatics, idiots, persons of unsound mind and habitual drunkards: *Provided, however,* The power hereby granted to trust companies to act as guardian or administrator with or without the will annexed shall not be construed to deprive parties of the prior right to have issued to them letters of guardianship, or of administration, as such right now exists under the laws of this state.

“(14) To exercise the powers conferred on and to carry on the business of a safe deposit company.

“(15) To collect coupons on, or interest upon, all manner of securities when authorized so to do by the parties depositing the same.

“(16) To receive and manage any sinking fund of any corporation, upon such terms as may be agreed upon between said corporation and those dealing with it.

“(17) Generally to execute trusts of every description not inconsistent with the laws of this state or of the United States.

“(18) To receive money on deposit to be subject to check or to be repaid in such manner and on such terms, and with or without interest, as may be agreed upon by the depositor and the said trust company.”

It will be noticed that the powers of the proposed corporation as defined by its articles are almost, if not wholly, confined to an agency or trust business. It is true that the language used in the articles does not follow the language of the act of 1903, and does not include all the items or powers named in that act; but, in relation to the same subjects, the powers of the proposed corporation are substantially the same as the powers of trust companies organized under the act of 1903. It is unnecessary to point out the specific similarity, because a careful comparison readily discloses the fact. If trust companies could have been organized under the general provisions of Bal. Code, § 4250, prior to the act of 1903, such companies, except possibly such as are therein specifically named, cannot now be incorporated under those provisions; because the act of 1903 expressly provides that hereafter no corporation shall be organized for the purpose of carrying on a trust company business in the state of Washington except under this act. Holding, as we do, that the articles of incorporation offered to the secretary of state authorize a trust company business, and it being conceded that relators have not complied with the act of 1903 with regard to incorporation, it follows that the relators are not entitled to file the articles.

Relators contend, however, that the duties of the secretary

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of state are purely ministerial, and that it is his duty to file and record the articles of incorporation as offered, and that the remedy of the state is by *quo warranto* proceedings. This same question was presented in *State ex rel. Osborne, Tremper & Co. v. Nichols*, 38 Wash. 309, 80 Pac. 462, and we there held that the secretary of state was under no duty to file articles not entitled to be filed, and that this court will not compel him to do a vain or illegal act.

The writ is therefore denied.

DUNBAR, RUDKIN, FULLERTON, HADLEY, CROW, and ROOT, JJ., concur.

[No. 5732. Decided October 31, 1905.]

THE STATE OF WASHINGTON, *on the Relation of Wyman, Partridge & Company, Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Defendant*.¹

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40	558

MANDAMUS—TO PREVENT CHANGE OF VENUE—ADEQUACY OF REMEDY BY APPEAL. If a court has exclusive jurisdiction of a cause without power to order a change of venue, mandamus is the proper remedy to compel it to proceed with the trial after improperly granting a change of venue, the remedy by appeal not being adequate.

VENUE—CHANGE OF—IN GARNISHMENT PROCEEDINGS—STATUTE—CONSTRUCTION. Bal. Code, § 4857, authorizing a change of venue where an impartial trial cannot otherwise be had or where convenience and justice will be forwarded by the change, applies to garnishment proceedings; since the statute is in furtherance of justice and should be liberally construed.

Application filed in the supreme court June 20, 1905, for a writ of mandamus to compel the superior court for Spokane county, Huneke, J., to proceed with the trial in a garnishment proceeding, after granting a change of venue on motion of the garnishees. Writ denied.

¹Reported in 82 Pac. 875.

James A. Williams and *Denton M. Crow*, for relator, contended, among other things, that there is no right to a change of venue in a garnishment proceeding. *Rood, Garnishment*, §§ 236, 326; *Kelly v. Ryan*, 8 Wash. 536, 36 Pac. 478; *Wooding v. Puget Sound Nat. Bank*, 11 Wash. 527, 40 Pac. 223; 3 Current Law, p. 1554, § 7; *Miller & Co. v. Mason & Co.*, 51 Iowa 239, 1 N. W. 483; *Garland v. McKittrick*, 52 Wis. 261, 9 N. W. 160; *Toledo v. Reynolds*, 72 Ill. 487; *Smith v. Dickson*, 58 Iowa 444, 10 N. W. 850; *First Nat. Bank v. Dunn*, 102 Ala. 204, 14 South. 559; *Hancock v. Gibson* (Ark), 79 S. W. 1061; *Wilson v. Pennoyer* (Minn.), 101 N. W. 502; *Jones v. Cummins*, 17 Tex. Civ. App. 661, 43 S. W. 854; *Townsend v. Fleming* (Tex. Civ. App.), 64 S. W. 1006.

Graves & Graves and *B. H. Kizer*, for defendant, contended, among other things, that there is an adequate remedy at law. *State ex rel. Townsend Gas etc. Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 933; *State ex rel. Carrau v. Superior Court*, 30 Wash. 700, 71 Pac. 648; *State ex rel. Port Orchard Inv. Co. v. Superior Court*, 31 Wash. 410, 71 Pac. 1100; *State ex rel. Hubbard v. Superior Court*, 24 Wash. 438, 64 Pac. 727. A law providing that a case shall be commenced in a certain county does not prevent a change of venue. *Duffy v. Duffy*, 104 Cal. 602, 38 Pac. 443; *Hancock v. Burton*, 61 Cal. 70; *Meldrum v. Sarvis*, 1 N. J. L. 203; *Starks v. Bates*, 12 How. Prac. 465; *McLeod v. Ellis*, 2 Wash. 117, 26 Pac. 76. That a garnishment proceeding is ancillary to another action is not sufficient to debar garnishee defendants from a change of venue. *Finn v. Spagnoli*, 67 Cal. 330, 7 Pac. 746; *Burkett v. Holman*, 104 Ind. 6, 3 N. E. 406; *Lester v. Lester*, 70 Ind. 201; *Backus v. Cheney*, 80 Me. 17, 12 Atl. 636; *State v. Whitcomb*, 52 Iowa 85, 2 N. W. 970, 35 Am. Rep. 258; *In re Jackman's Will*, 27 Wis. 409; *Rood, Garnishment*, § 327.

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RUDKIN, J.—Original application for a writ of mandamus. The relator brought an action in the superior court of Spokane county against A. E. Flower and wife, and at the same time caused writs of garnishment to issue against certain insurance companies. Flower and wife suffered a default in the main action, and a final judgment was entered against them. The insurance companies made return to the writs of garnishment, denying liability to the defendants in the main action, and the relator filed affidavits controverting the returns, as required by statute. Thereupon the insurance companies, as garnishees, applied to the court in due form for a change of place of trial of the garnishment proceedings to Kittitas county, on the ground that the convenience of witnesses and the ends of justice would be forwarded by the change. The relator resisted this application, on the ground that the provisions of our statute relating to a change of the place of trial do not apply to garnishment proceedings, and that the court was without jurisdiction to grant the application. The court overruled the objection and allowed the application. The relator thereupon applied to this court for a writ of mandate, directing the court below to proceed with the trial notwithstanding the change of venue, basing its right to the writ upon the same grounds as were urged in its objection to the granting of the application.

At the threshold of the proceeding the respondent raises the objection that the relator has an adequate remedy by appeal, and that mandamus will not lie. If the contention of the relator is correct, viz., that the superior court of Spokane county had exclusive jurisdiction to hear and determine the garnishment proceedings without power or discretion to order a change of venue, mandamus is the proper remedy. The mere fact that the superior court of Kittitas county, to which the proceedings have been transferred, may erroneously assume jurisdiction and that the proceedings may in that way eventually reach this court by appeal, is not, in our opinion, an adequate remedy.

We cannot, however, agree with the contention of the relator that the provisions of our statute [Bal. Code, § 4857] authorizing a change of venue where there is reason to believe that a fair and impartial trial cannot be had in the county where the action is pending, or where the convenience of witnesses or the ends of justice will be forwarded by the change, do not apply to garnishment proceedings. Statutes conferring the right to a change of venue are enacted with a view of affording litigants a fair and impartial trial. They are in furtherance of justice, and should be liberally construed so as not to defeat the right. 4 Ency. Plead. & Prac., 380; *Buck v. Eureka*, 97 Cal. 135, 31 Pac. 845; *Packwood v. State*, 24 Ore. 261, 33 Pac. 674. In the last case cited, the court says:

"These provisions of the statute should receive a broad and liberal, rather than a technical and strict, construction, and the courts ought not to be too astute in discovering some refined and subtle distinction to avoid their operation, for, as was said by Mr. Justice Graves, 'The immediate rights of the litigants are not the only object of the rule, but sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observation.' *Stockwell v. Township Board of White Lake*, 22 Mich. 349."

The relator has cited a large number of authorities, but they have no direct application to the question now under consideration. They discuss the general nature of garnishment proceedings, the court of original jurisdiction to issue the writ, and the right to a change of venue on the ground of residence of the garnishee. In *Kelly v. Ryan*, 8 Wash. 536, 36 Pac. 478, cited by the relator, the court held that the garnishment proceeding was simply a step in the main action, was ancillary thereto, and that the plaintiff was not required to pay an additional docket fee of four dollars upon suing out a writ of garnishment. In so far as the court there held that the garnishment was but a step in the main action and

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was ancillary thereto, the decision is in accord with all the authorities.

In *Title Guarantee & Trust Co. v. Northwestern Theatrical Ass'n*, 23 Wash. 517, 63 Pac. 212, the court held that a change of venue in the main action carried the garnishment proceeding with it, and that Bal. Code, § 4854, which provides that an action against a corporation shall be brought in a county where it has an office for the transaction of business, has no application to a garnishment proceeding. In *Miller & Co. v. Mason & Co.*, 51 Iowa 239, 1 N. W. 483, the court held that a garnishee was not entitled to demand a change of venue to the county of his residence. The two cases last cited are not in point here. The county in which the main action is pending is the *proper* county in which to sue out a writ of garnishment, regardless of the place of business of a corporation or the residence of the garnishee, and to that extent the garnishment statute supersedes other statutes requiring certain actions to be brought in a particular county. Thus, notwithstanding the decision in *Miller & Co. v. Mason & Co.*, *supra*, the same court said in *Westphal, Hinds & Co. v. Clark*, 42 Iowa, 371:

"If the garnishee should be satisfied that he could not obtain a fair trial in the county wherein the main cause was tried, and should make the proper showing, it would not, we apprehend, be claimed that he would not be entitled to a change of venue."

On the other hand, in *Hewitt v. Follett*, 51 Wis. 264, 8 N. W. 177, it was held that a third party, brought into a garnishment proceeding at the instance of the garnishee, could demand a change of venue as a matter of right, upon filing the statutory affidavit. In *Burkett v. Holman*, 104 Ind. 6, 3 N. E. 406; *Burkett v. Bowen*, 104 Ind. 184, 3 N. E. 768; *Burkett v. Bowen*, 118 Ind. 379, 21 N. E. 38; and *Burkett v. Holeman*, 119 Ind. 141, 21 N. E. 470, it was held that a party brought in, on proceedings supplementary to execution, was entitled to a change of venue. In *Cross*

v. Spillman, 93 Ala. 170, 9 South. 362; and *Martin, Perrin & Co. v. Chicago etc. R. Co.*, 50 Mo. App. 428, it was held that a change of venue in the main action or in the garnishment proceeding did not carry the other with it; thus showing that there is no objection to a severance. In *People v. Almy*, 46 Cal. 245, issues were made up in the probate court in a proceeding to contest a will. The probate court granted a change of venue, and one of the parties applied to the supreme court for a writ of mandate, as in this case, claiming that there was no authority in law for the change. After referring to the various statutes on the subject, the court says:

"Considering all these provisions together, we entertain no doubt whatever that in a case like this it is competent for the probate court to order the place of trial to be changed. A different rule would operate, practically, as a denial of justice. In this case a very large estate has been tied up, and its administration impeded for several years, whilst three fruitless trials were being had, at an expense to the estate of nearly ten thousand dollars; and with a very slight probability that for years to come an impartial jury could be had in that county. Nor do we see any practical difficulty which is to result from changing the place of trial. A transcript of the proceedings and the result of the trial can be certified by the court in San Francisco to the court in Marin, on receiving which the latter court will enter the appropriate judgment with proper recitals."

In § 327 of Rood on Garnishment, the author says:

"The decisions holding that the garnishment follows the main case on change of venue, are no authority to the effect that the garnishee cannot have a change of venue, for no judgment can be rendered against him until the main action is in judgment, after which the reasons for keeping the two together are less."

See, also, *Townsend v. Townsend*, 9 Gill (Md.) 506; *Backus v. Cheney*, 50 Me. 17, 12 Atl. 636; *Treasurer v. Wygall*, 46 Tex. 447; *Kittridge x. Kinne*, 80 Mich 200, 44 N. W. 1051.

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No serious inconvenience can result to the relator by allowing the change of venue. The only connection between the main action and the garnishment proceeding, so far as we can discover, is this: A voluntary dismissal or judgment for the defendant on the merits in the main action carries the garnishment with it. The judgment against the garnishee cannot exceed in amount the judgment in the main action, and a satisfaction of the principal judgment satisfies the judgment against the garnishee. Any of these steps in the main action may readily be proved in the court to which the garnishment proceeding has been transferred, by a certified copy of the record. A garnishment proceeding is neither more nor less than an action by the defendant against the garnishee for the use of the plaintiff. It possesses all the elements of any other action. The law contemplates that contingencies will arise where the ends of justice demand a change in the place of trial. A garnishment proceeding comes within the spirit of this law, and is not excluded by the letter.

We are therefore constrained to hold that the court below acted within its jurisdiction, and the application for the writ is accordingly denied.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ., concur.

Root, J., concurs in the result.

Crow, J., being disqualified, took no part.

[No. 5909. Decided November 6, 1905.]

*In the Matter of the Petition of the City of Seattle.*¹

APPEAL—ABANDONMENT—RIGHT OF RESPONDENT TO DISMISSAL AND COSTS. The supreme court acquires jurisdiction of an appeal by the giving of notice and filing of a proper bond, after which the appellant cannot dismiss the appeal as a matter of right, and by service of notice; but the dismissal must be by order of court, and if not procured at the cost of appellant, the respondent may procure it with costs and an attorney's fee.

SAME—STATUTORY COSTS AND ATTORNEY FEE—AGAINST EACH OF SEVERAL APPELLANTS. Upon the dismissal of an appeal from an order of confirmation in a street condemnation proceeding, in which many of the property owners perfected appeals and then abandoned them, the respondent city is entitled to tax but one bill of costs and one attorney's fee.

Motion to dismiss appeals from an order of the superior court for King county, Morris, J., entered May 31, 1905, confirming an assessment roll; also, motion for separate attorney's fees. Appeal dismissed, with one attorney's fee.

Harold Preston and C. L. Parker, for appellants.

John K. Brown and Sherwood F. Gorham, for respondent.

RUDKIN, J.—One hundred and three parties, owning separate and distinct parcels of land, gave notice of appeal to this court from an order confirming an assessment roll in the court below. Some of the appellants gave, or attempted to give, bonds to render their appeals effectual, others did not. Before any further steps were taken, or expenses incurred, in the prosecution of the appeals, the appellants filed in the court below and served on the respondent, a notice that they and each of them abandoned their respective appeals. After the filing and service of such notice of abandonment, the respondent filed a short record in this court, accompanied by one hundred and three motions to dismiss,

¹Reported in 82 Pac. 740

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and now contends that it is entitled to costs, including a \$25 statutory attorney fee, against each appellant, or attorney fees aggregating \$2,575 in all. The motion to dismiss is not resisted, but the appellants contend that the respondent is not entitled to recover costs at all, by reason of their abandonment of their appeals, and that in no event is the respondent entitled to more than one bill of costs, including one statutory attorney fee, against all the appellants.

We are of opinion that the respondent is entitled to the order of dismissal, and to its statutory costs. This court acquires jurisdiction of an appeal by the giving of notice and the filing of a proper bond, and that jurisdiction cannot be defeated by any act of the parties. An appellant cannot dismiss an appeal as a matter of right. *Agassiz v. Kelleher*, 9 Wash. 656, 38 Pac. 221; *Allen v. Catlin*, 9 Wash. 603, 38 Pac. 79; *Post v. Spokane*, 28 Wash. 701, 69 Pac. 371, 1104. The abandonment could only operate as an estoppel against the further prosecution of the appeals, and the court might permit the parties to prosecute their appeals notwithstanding the abandonment, if it were made to appear that the abandonment was filed and served through inadvertence or mistake. A respondent has a right to have an appeal finally disposed of in this court and that can only be done by the court itself.

Bal. Code, § 6519, providing that no withdrawal or dismissal of an appeal which does not go to the substance or the right of appeal, shall preclude a party from taking another appeal within the time limited by law, only authorizes a party to withdraw an appeal for the purpose of taking a further appeal within the time limited by law. It does not authorize a party to withdraw an appeal absolutely and unconditionally, as clearly appears from the decisions of this court in the cases above cited. If an appellant desires to dismiss his appeal, he may apply to this court for that purpose; and, if no costs have been incurred by the respondent in the prosecution of the appeal, and no rights of the re-

spondent will be affected by the dismissal, the appeal will be dismissed without costs. But if this court acquires jurisdiction of the appeal, and the appellant does not procure a dismissal at his own expense, the respondent is entitled to have the appeal formally dismissed, and to recover his costs as an incident.

The contention of the respondent that it is entitled to costs, including statutory attorney fees, against each appellant is wholly without merit. As well might a plaintiff in the court below claim separate costs and attorney fees against each of several defendants on a default judgment, because the defendants were not united in interest and might have appeared separately and filed separate answers. If the prevailing party is entitled to recover more than one statutory attorney fee in this court in any case, a question we do not decide, he is only entitled thereto where the adverse parties appear separately and file separate briefs. It would have been entirely competent for these several appellants to appear jointly in this court and file a single brief, raising only such objections to the assessment as were common to all of them. In fact many of them did so join in their objections in the court below. Had they pursued this course, it would scarcely be claimed that either party was entitled to more than one bill of costs, including one statutory attorney fee, and why should the respondent recover greater costs where the appellants make no appearance.

The motion to dismiss is granted, and the clerk of this court will tax the costs against all the appellants as upon a single appeal.

MOUNT, C. J., FULLERTON, HADLEY, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 5738. Decided November 6, 1905.]

THE STATE OF WASHINGTON, *on the Relation of Spokane
Terminal Company, Plaintiff*, v. THE SUPERIOR
COURT FOR SPOKANE COUNTY, *et al.*,
*Defendants.*¹

**COSTS—IN SUPREME COURT—ATTORNEY FEE—ORIGINAL PROCEEDING—
STATUTE—REPEAL BY IMPLICATION—CONSTRUCTION.** Under subdivision
5 of the Code of 1881 (2 Hill's Code, § 829), providing for an attor-
ney's fee of \$15 in all actions where judgment is rendered in the
supreme court, such fee may be taxed in an original proceeding for
a writ of review; and said section was not impliedly repealed by the
act of 1893 (Bal. Code, § 6528), which is applicable only to cases
appealed to the supreme court.

COSTS—IN WHAT ACTIONS TAXABLE—CERTIORARI. An application
for a writ of certiorari under Bal. Code, § 4793, is an "action," within
the meaning of the statute relating to the taxation of costs.

Application filed July 15, 1905, to retax costs by striking
from the cost bill an item of \$15 attorney's fee, allowed to
defendants upon denying an application in the supreme court
for a writ of review. Denied.

Graves & Graves, for relator.

John B. Hess and *H. M. Stephens*, for defendants.

Root, J.—The issue here involved arises upon a motion
in the above entitled cause to retax costs, by striking from
the cost bill, as allowed, the item of \$15 attorney's fee. The
above entitled matter was an original proceeding in this court
for a writ of review. Plaintiff's application having been
denied, and defendants having filed a cost bill, plaintiff
makes this motion to retax, as aforesaid, claiming that there
is no authority for allowing the item mentioned. The at-
torney fee in question was allowed pursuant to subdivisions
4 and 5 of § 512, Code of 1881 (2 Hill's Code, § 829). These
subdivisions were omitted when the section was brought for-

¹Reported in 82 Pac. 878.

ward in Bal. Code (Bal. Code, § 5172)—the compiler believing that they were impliedly repealed by the enactment of Bal. Code, § 6528.

It is claimed by the plaintiff, and apparently conceded by defendants, that no costs can be allowed except by statutory authority. Defendants maintain that the subdivisions of § 512 referred to are still in force, and are not affected by Bal. Code, § 6528, this latter section being a portion of the act of 1893, entitled "An act relating to appeals to the supreme court." Defendants contend that this act has to do solely with cases brought here upon appeal, and that it has no application to actions originated in this court. We think this position tenable. Subd. 4 of said § 512, Code of 1881, reads as follows: "In all actions removed to the supreme court and settled before argument, \$10;" and subd. 5 of said section reads as follows: "In all actions where judgment is rendered in the supreme court, after argument, \$15." It will be noticed that the language of this 5th subdivision is not confined to actions "removed to the supreme court," but is very comprehensive in its language. "All actions where judgment is rendered," are the words used. This expression would seem to include not only actions appealed or otherwise "removed to the supreme court," but would also apply to original actions in this court wherein judgments are rendered.

It is also maintained by plaintiff that a proceeding of this character is not an "action." We are, however, constrained to believe that this character of a proceeding is an action within the contemplation of the statutes in question. Bal. Code, § 4793, reads as follows: "There shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action." The statute authorizing a writ of review is the same as that authorizing mandamus and prohibition, and is entitled, "An act regulating special proceedings of a civil nature." It is a pro-

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ceeding for the enforcement of rights and the redress of wrongs. In the case of *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207, this court, in speaking of mandamus, employed this language:

“In our practice, mandamus is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs. The procedure has in it all the elements of a civil action.”

It would occasion an inconsistency if plaintiff's construction of the statute were to be upheld. Why the legislature should provide for an attorney's fee in the superior court and another attorney's fee upon appeal in the supreme court, but should not authorize such a fee in an original proceeding in the supreme court, would constitute a query not readily to be answered. To hold that the said attorney's fee of \$15 is provided for by the statute makes it consistent with the other statutes mentioned.

The motion to retax is denied.

MOUNT, C. J., RUDKIN, HADLEY, CROW, and DUNBAR, JJ., concur.

[No. 5398. Decided November 7, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. O. V. LAWSON,
Appellant.¹

STATUTES—AMENDMENT—SETTING FORTH IN FULL. Const., art. 2, § 37, does not require, upon the amendment of a statute, that the entire act as amended shall be set forth in full, but only the amended sections.

PHYSICIANS AND SURGEONS—PRACTICING WITHOUT LICENSE—PROSECUTION—PROOF OF LICENSE—RECORDS. Upon a prosecution for practicing medicine without a license, there is sufficient *prima facie* evidence of the fact that the accused had no license where it was shown (1) that the secretary of the board of examiners had never issued him a license, (2) that he had filed no license with the county clerk, and (3) that his name did not appear on the records of the county auditor as a licensed physician.

¹Reported in 82 Pac. 750.

CRIMINAL LAW—EVIDENCE—BURDEN OF PROOF—CONSTITUTIONALITY OF STATUTE. The statute making certain records *prima facie* evidence of the existence or nonexistence of a license to practice medicine, is not unconstitutional as imposing the burden of proof upon the accused.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 29, 1905, upon a trial and conviction of the offense of practicing medicine without a license. Affirmed.

Allen, Allen & Stratton (George M. Sinclair, of counsel), for appellant.

Kenneth Mackintosh, Anthony M. Arntson, and Walker & Munn, for respondent.

RUDKIN, J.—This is an appeal from a judgment entered on the verdict of a jury finding defendant guilty of practicing medicine without a license. The first act of the state legislature regulating the practice of medicine will be found in the Laws of 1889-90, at page 114. The act consists of eleven sections, including an emergency clause. In 1901 an amendatory act was passed, entitled,

“An act to amend an act entitled, ‘An act to regulate the practice of medicine and surgery in the State of Washington, and to license physicians and surgeons; to punish all people violating the provisions of this act, and to repeal all laws in conflict therewith, and declaring an emergency,’ approved April 10, 1890” Laws 1901, p. 47.

The later act amended sections 3, 7, and 8 of the former, setting forth at length the three sections as amended. The first contention of appellant is, that there is no law in this state authorizing the licensing of persons to practice medicine and surgery; that the act of 1889-90 was entirely superseded by the amendatory act of 1901. The basis of this contention, as we understand it, is this: The amendatory act of 1901 does not set forth at full length the sections of the original act which were not amended, and it is claimed

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that this is required by art. 2, § 37 of the state constitution, which reads:

“No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.”

Whatever support this contention may find in the earlier decisions of the courts of Louisiana and Indiana, it is no longer considered as sound. Speaking of this constitutional provision, Judge Cooley says:

“It has also been deemed important, in some of the states, to provide by their constitutions, that ‘no act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length.’ Upon this provision an important query arises. Does it mean that the act or section revised or amended shall be set forth and published at full length as it stood before, or does it mean only that it shall be set forth and published at full length as amended or revised? Upon this question perhaps a consideration of the purpose of the provision may throw some light. ‘The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effects, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to, but not published, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for the express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation.’ If this is a correct view of the purpose of the provision, it does not seem to be at all important to its accomplishment that the old law should be republished if the law as amended is given in full, with such reference to the old law as will show for what the new law is substituted. Nevertheless, it has been decided in Louisiana that the constitution requires the old law to be set forth and published; and the courts of Indiana, assum-

ing the provision in their own constitution to be taken from that of Louisiana after the decisions referred to had been made, at one time adopted and followed them as precedents. It is believed, however, that the general understanding of the provision in question is different, and that it is fully complied with in letter and spirit, if the act or section revised or amended is set forth and published as revised or amended, and that anything more only tends to render the statute unnecessarily cumbrous." Cooley, Const. Lim. (7th ed.), p. 214.

See, also, *The Borrowdale*, 39 Fed. 376. The unamended sections of the act of 1889-90 and the three sections as amended by the act of 1901 are, therefore, in full force and effect, and constitute the law on the subject under consideration.

It is next contended that the testimony is not sufficient to sustain the verdict of the jury. The uncontradicted testimony showed that the appellant practiced medicine as defined by the statute. The only remaining question is, did he have a license so to do? The testimony tending to show that he had no such license is the following: (1) The testimony of the secretary of the state board of medical examiners to the effect that the appellant never obtained a license from said board; (2) the testimony of the county clerk of King county to the effect that no license or certified copy of a license was of record in his office; and (3) the testimony of the county auditor of King county to the effect that the appellant's name did not appear as a licensed physician in the records of his office. The appellant contends that, notwithstanding all such testimony, he may have been duly licensed in some other county in the state prior to the passage of the act of 1889-90, and such license not appear in any of said offices. This is, no doubt, true, but the statute makes the records of the clerk's office *prima facie* evidence of the existence or nonexistence of a license. The appellant concedes this, but says the statute declares an arbitrary and illogical rule of evidence, and is therefore unconstitutional.

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Syllabus.

Where a license issued in any county of a state authorizes the prosecution of a business or the practice of a profession in any part of the state, the difficulty of proving that a given person has no license is very great. This fact has induced many of the states to enact laws imposing on the defendant the burden of proving a license in all prosecutions such as this, and these statutes have been declared constitutional. Wharton, Crim. Ev. (9th ed.), § 342; *Commonwealth v. Curran*, 119 Mass. 206. If the state can require the defendant to justify under his license in the absence of any proof whatever, it goes without saying that it can likewise declare what character of proof shall constitute *prima facie* evidence.

Certain objections are urged against the instructions of the court, but the instructions were not excepted to, and we cannot consider them.

There is no error in the record, and the judgment is affirmed.

MOUNT, C. J., DUNBAR, HADLEY, CROW, ROOT, and FULLERTON, JJ., concur.

[No. 5810. Decided November 7, 1905.]

DENNIS DWYER *et al.*, as *Executors of the Will of John M. Nolan, Deceased, Respondents*, v. ELIZABETH NOLAN, *Appellant*.¹

DIVORCE—DECREE—PROCEEDING TO VACATE AFTER DEATH OF PARTY—SUBSTITUTION OF EXECUTORS—NO SUBJECT OF LITIGATION. An action for a divorce is purely personal, and upon the death of either party, the subject-matter of the action is eliminated and a judgment for divorce cannot be thereafter vacated for want of jurisdiction to render it.

SAME—CONSENT OF EXECUTORS. After the death of a party to a decree of divorce, his executors cannot consent to the vacation of the decree or be substituted as parties for the purpose of service of notice.

¹Reported in 82 Pac. 746.

JUDGMENT—JURISDICTION TO VACATE—NOTICE. The inherent jurisdiction of a court to set aside a decree void for want of jurisdiction, is no more potent than jurisdiction conferred by statute, and such a judgment cannot be vacated without notice, even for the purpose of clearing the record.

Appeal from an order of the superior court for King county, Frater J., entered May 23, 1905, after a hearing upon affidavits before the court without a jury, denying defendant's motion to vacate a decree of divorce. Affirmed.

J. W. Langley and Robert D. Hamlin, for appellant.

Boyle & Warburton, for respondents.

DUNBAR, J.—This case is appealed from the order of the superior court of King county, refusing to vacate a judgment in a divorce case. The divorce action was brought by John L. Nolan, and the decree was granted on November 20, 1899. On April 6, 1905, the appellant appeared in this action by motion, and affidavits in support of the same, and sought to have the decree of November 20, 1899, set aside and vacated. The plaintiff, John M. Nolan, having died in January, 1905, his executors were substituted as parties plaintiff. The contention of the appellant is that the court acted without competent jurisdiction of the party defendant in the divorce proceeding, and that the judgment was therefore void.

We will not enter into an investigation of the question presented as to whether or not the service in the divorce proceeding was sufficient to give the court jurisdiction of the person of the defendant, for the reason that there are no proper parties to this proceeding, and that, in the nature of things, the plaintiff having died, the question of divorce cannot be relitigated. It will not be gainsaid that an action for divorce is a purely personal action. Nothing is sought to be affected but the marital status of the husband and wife. The distribution of property in such an action is incidental, and it is clearly incontestable that, upon the death of either party, whether before or after the decree, the subject of the contro-

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versy is eliminated. If the death of the plaintiff in this case had occurred before judgment, it will not be urged that there could have been a substitution of his executors to represent him in the prosecution of the case. Such a proposition, for manifest reasons, would not be entertained by a court for a moment. What additional authority or power did they have to represent him in the same case when he died after judgment? Manifestly none. They cannot stipulate with reference to the decree. They cannot consent to setting aside the judgment. There is no conceivable particular in which they represent the deceased or the heirs with reference to the subject-matter of the action, in the slightest degree. The very nature of the action renders this impossible. In the light of this fact, a service upon them of a motion to vacate the judgment is farcical, and the case proceeded, if it proceeded at all, without notice and on a purely *ex parte* basis.

An argument of necessity is presented by the appellant to the effect that it is impossible, in view of the death of the plaintiff, to get service on any one else. But this argument defeats itself, for if there is anything which is the subject of litigation, there must of necessity be some one who is interested in that thing, and represents it, and upon whom service can be made. If there is no such thing, it is equally plain that there is no subject of legal controversy.

Something has been said of the inherent jurisdiction of the court to set aside void decrees. Inherent jurisdiction is no more potent than jurisdiction that is conferred by statute, and it is as much prescribed by orderly methods. It is not a loose, arbitrary, and unlicensed jurisdiction, which the court can exercise without restraint, untrammelled by the observance of the methods prescribed by law, but it is simply jurisdiction, and no more. In fact, the court should be more careful, if any distinction is to be made, in the exercise of jurisdiction which is evolved from the decisions of courts, and therefore in a measure self-assumed, than in the exercise

of jurisdiction that is conferred by the law-making power. But there is no jurisdiction in courts, inherent or otherwise, to adjudicate the rights of litigants without notice, actual or constructive.

It is suggested that, if the court, upon an examination, finds that the judgment was void for want of service, it will vacate the judgment for the purpose of clearing its records of void judgments. But the parties to an action have as much right to be heard upon that question as on any other. Our statute provides (Pierce's Code, § 362) that, when a party to an action has appeared in the same, he shall be entitled to at least three days' notice of any trial, hearing, motion, application, sale, or proceeding therein, etc. If this court should enter a judgment of vacation without having jurisdiction of the parties to the judgment, it would be guilty of the same illegal action with which the lower court is charged. So far as the property rights are concerned (if there are any), if the judgment is void, such rights are in no way affected by it, and all the avenues are open for the determination of such rights where the parties affected can all be heard.

The judgment is affirmed.

MOUNT, C. J., ROOT, RUDKIN, HADLEY, and CROW, JJ.,
concur.

FULLERTON, J., concurs in the result.

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Opinion Per MOUNT, C. J.

[No. 5773. Decided November 10, 1905.]

ERIC FLODING *et al.*, Respondents, v. J. A. DENHOLM, as
*Sheriff of Pierce County, Appellant.*¹

APPEAL—STATEMENT OF FACTS—TIME FOR SETTLEMENT. As Bal. Code, § 5058, fixes no time within which a statement of facts must be settled or notice of settlement given, the appellant may do so within a reasonable time, and the statement will not be struck out because not settled at the time of the service of briefs.

HUSBAND AND WIFE—COMMUNITY REAL PROPERTY—LIABILITY FOR SURETYSHIP OBLIGATION OF HUSBAND. The community real property is liable upon a suretyship obligation entered into by the husband alone for the benefit of the community personalty, by the giving of an appeal bond upon an appeal from a judgment against a corporation in which he had invested community property as a stockholder, although such investment was made against the protests of the wife (HADLEY and FULLERTON, JJ., dissenting).

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered February 24, 1905, after a hearing on the merits before the court without a jury, enjoining the sheriff of Pierce county from selling community property under a judgment against the husband on appeal and supersedeas bonds. Reversed.

James J. Anderson and *H. P. Burdick*, for appellant.

A. R. Titlow, for respondents.

MOUNT, C. J.—In the year 1903 three several judgments were obtained in the superior court of Pierce county, against the Washington Match Company, a corporation. The corporation appealed from each of these judgments to this court. A supersedeas bond on appeal was given in each of the cases. Eric Floding, one of the respondents herein, was a surety on each of said supersedeas bonds. All of said judgments were afterwards affirmed by this court, and judgments were rendered against the Washington Match Company and the sure-

¹Reported in 82 Pac. 738.

ties on the appeal and supersedeas bonds. Thereafter executions were issued, and levies made upon lots 1 to 11, inclusive, in block 26, second amended plat of Hosmer's addition to Tacoma. These lots were advertised for sale by the sheriff of Pierce county, when this action was brought to restrain the said sale. Upon the trial of the case it appeared, that Eric Floding was a stockholder in the Washington Match Company at the time he became surety upon the supersedeas bond above mentioned; that he owned one thousand shares of the stock of said corporation, for which he had paid \$1,000, from community funds of himself and wife; that this stock was purchased against the will of his wife; and that the corporation, at the time of the trial, was insolvent. After hearing the evidence, the trial court rendered a decree enjoining the sheriff from selling the property to satisfy the judgments against Eric Floding. From this decree the sheriff prosecutes this appeal.

Respondents move to strike the statement of facts and dismiss the appeal upon several grounds, all of which are based upon the fact that the appellant's opening brief was served and filed before the statement of facts was settled and certified by the trial court. The condition of the record is as follows: The decree appealed from was rendered on February 23, 1905. It was entered on the next day. Notice of appeal was served on February 27, 1905, and the appeal bond was filed on the same day. The proposed statement of facts was filed and served on March 18, 1905. Within time thereafter, respondents served and filed proposed amendments to the proposed statement of facts. The transcript was filed in the superior court and certified on May 22, 1905. The appellant's opening brief was served upon respondents on June 28, 1905. At this time the proposed statement of facts had not been settled or certified by the trial court. On July 25, 1905, before the statement of facts had been settled, respondents served and filed their answer brief, which contained motions to dismiss because the statement

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Opinion Per MOUNT, C. J.

of facts had not at that time been settled or certified, and no notice to settle the same had been given. Thereafter, on July 15, 1905, appellant gave notice to respondents that he would apply to the trial court on the 19th day of July, 1905, to settle and certify the statement of facts. On July 19th the settlement of the statement of facts was continued until the 25th of the same month, and respondents were served with notice thereof. On the 25th of July, 1905, the court settled the proposed statement of facts and incorporated therein all the amendments proposed by respondents.

It will be readily seen that the only imperfection in the record was the failure of the appellant to notice the proposed statement of facts for settlement prior to the time of filing his opening brief. The statute, Bal. Code, § 5058, fixes no time within which a proposed statement of facts must be settled and certified, or within which notice of the settlement must be given. *Dodds v. Gregson*, 35 Wash. 402, 77 Pac. 791. It simply provides that, after amendments have been proposed to the statement, "either party may then serve upon the other a written notice that he will apply to the judge of the court before whom the case is pending or was tried, . . . to settle and certify the bill or statement." The burden is, no doubt, upon the appellant to perfect his statement of facts, and he must act within a reasonable time or be held to have abandoned his appeal. In this case all the steps except the notice to settle the proposed statement were taken promptly and within time, indicating that there was no abandonment, or intention on the part of the appellant to abandon the appeal. Under these circumstances we think we should not dismiss the appeal. The motion is therefore denied.

Upon the merits of the case there is but one question, viz., is community real estate liable for a surety debt, contracted by the husband for the benefit of a corporation in which he is a stockholder, and where such stock is community property

of himself and wife? This question is no longer an open one in this state. This court has repeatedly held that the community property is liable for a community debt (*Oregon Improvement Co. v. Sagmeister*, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233), and that the community property is liable for an obligation of suretyship, incurred by the husband in behalf of a corporation in which he is a stockholder, when the stock belongs to the community. *Horton v. Donohoe-Kelly Banking Co.*, 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; *McKee v. Whitworth*, 15 Wash. 536, 46 Pac. 1045; *Allen v. Chambers*, 18 Wash. 341, 51 Pac. 478; *Allen v. Chambers*, 22 Wash. 304, 60 Pac. 1128; *Shuey v. Holmes*, 22 Wash. 193, 60 Pac. 402; *Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536.

The case of *Brotton v. Langert*, 1 Wash. 73, 23 Pac. 688, relied upon by respondent, is readily distinguished from the case at bar by reason of the fact that the liability of the husband in that case arose on account of a trespass, and it was held, for that reason, that the community property was not liable in cases of that kind, or in cases where the debt was not created for the benefit of the community, or was a separate debt of the husband. *Shuey v. Holmes*, 20 Wash. 13, 54 Pac. 540.

The case of *Spinning v. Allen*, 10 Wash. 570, 39 Pac. 151, in so far as it is applicable to the case at bar, was substantially overruled in the later cases above cited, particularly in *Horton v. Donohoe-Kelly Banking Co.*, and *Allen v. Chambers*. So that the rule now is that community property is liable for a debt created by the husband for the benefit of the community. But such property is not liable for a debt created by a tort of either spouse, or one which is not for the benefit of the community. The fact that the wife was opposed to the purchase of the stock, or that the corporation was insolvent at the time of the levy of the execution upon the property, would not change the liability of the community property to respond to the debt of the community.

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Dissenting Opinion Per HADLEY, J.

The judgment appealed from is therefore reversed, and the cause remanded, with instructions to the lower court to deny the restraining order as to the property hereinbefore described.

DUNBAR, RUDKIN, and CROW, JJ., concur.

FULLERTON, J., dissents.

HADLEY, J. (dissenting) — I dissent, particularly on the ground that the wife did not consent to the purchase of the stock, but expressly opposed it. She did not assent to the community ownership of the purchased stock. The majority opinion holds that the community real estate is liable, on the theory that the husband's surety obligation was for the benefit of the community in protecting the stock, the ownership of which the wife had refused to assume. Such holding, in effect, permits the community real estate to become incumbered without the wife's consent, and against her express protest. While it is true that in this state the wife is practically helpless, so far as dominion over the community personal property is concerned, yet her interest in the community real estate is protected by statute and may not be incumbered without her consent. The husband should not, therefore, be permitted, without the wife's consent, to manipulate the community personal property so as to result in incumbering the real estate. If it be said that such a rule would interfere with commercial and business transactions in that it would permit the wife to urge lack of consent to the prejudice of good faith creditors, the answer is that the consent need not necessarily be expressly given, but may be implied from acquiescence, circumstances, and a course of conduct.

[No. 5760. Decided November 13, 1905.]

THE CITY OF SEATTLE, *Appellant*, v. T. D. HINCKLEY,
Respondent.¹

HEALTH—FIRE ESCAPES—MUNICIPAL REGULATION—APPLICATION TO BUILDINGS ALREADY CONSTRUCTED—STATUTES—RETROSPECTIVE EFFECT—CONSTRUCTION. A municipal ordinance requiring all buildings of a certain description within the fire limits to be supplied with certain described appurtenances as fire escapes, is intended to be retroactive and applies to all buildings, including those duly equipped with other fire escapes under former ordinances, especially in view of a clause making not only the construction or alteration of a building without fire escapes, but the violation of "any provision" of the act, punishable by fine.

SAME—POLICE POWER—VIOLATION OF MUNICIPAL REGULATIONS—VESTED RIGHTS IN COMPLIANCE WITH EXISTING REGULATION. A municipal ordinance requiring fire escapes upon buildings of a certain description within prescribed limits, is within the police power, and impairs no vested rights by reason of applying to buildings erected in compliance with a previous ordinance requiring a different kind of fire escapes.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 12, 1905, upon stipulated facts, acquitting the defendant of the violation of a municipal ordinance respecting fire escapes, upon an appeal from a conviction in a justice's court. Reversed.

Ellis De Bruler, for appellant.

Fred H. Peterson and *H. C. Force*, for respondent.

DUNBAR, J.—The city of Seattle, appellant in this case, instituted a criminal action against the defendant and respondent for the violation of a certain ordinance of the said city of Seattle. The respondent was tried and convicted in a police court, and fined in the sum of \$50. Upon appeal to the superior court, the case being submitted upon a statement of facts, the respondent was acquitted. The essential

¹Reported in 82 Pac. 747.

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part of the ordinance the violation of which is charged is as follows:

“That all hotels, office buildings, factories, tenements, and lodging houses, more than three stories in height, shall have at the ends of each main hallway on outside of building a fireproof stairway leading from within nine feet of the grade line of the street or alley to top of roof.”

Then follows a more minute description of the fire escape required. Section 126 is as follows:

“That any owner, builder, contractor, or other person who shall construct, alter, repair, or cause to be constructed, altered, or repaired, and any architect having charge of the same, who shall permit to be constructed, altered, or repaired, any building or other structure in violation of any provision of this ordinance, or who shall violate any provision thereof, unless other penalty for such violation be provided herein, shall be subject to a fine,” etc.

The statement of facts upon which the case was submitted showed that the respondent was the owner of a four-story brick building described in the complaint, that it was being used for office purposes, and located in the city of Seattle. It is admitted that respondent refused to erect and place at the north end of the main hallway of the said building, as required by ordinance, the fire escape required by said ordinance. It was also admitted, that in the year 1898 he had erected on the north side of said building, being at the north end of the main hallway described in the complaint, a fire escape, which was then erected under the supervision and direction of the fire chief of the said city of Seattle, and in compliance with the ordinances then regulating fire escapes; that the fire escape which he had erected was, at the time of its construction, a good and sufficient fire escape, and that it was in practically the same condition as when the same was erected; but that said fire escape and appurtenances do not comply with the ordinance of the city above mentioned. It was also admitted that said fire escape, together with said

platform and appurtenances, is sound and serviceable and fit for use, but that the same is not as serviceable and not as convenient and not as safe as the iron stairways provided for under said ordinance.

The contention of the respondent is that the ordinance was not retrospective in its scope, and that the city council did not intend in its passage that houses erected before the passage of the ordinance should be subject to its provisions; that it was not intended to interfere with fire escapes then existing; and that, if such ordinance should be so construed, it would be unconstitutional as depriving respondent of existing rights. The trial court took this view, and the respondent was acquitted and discharged from custody.

We think the court erred in its construction of this ordinance. It may be conceded that the fundamental rule of construction of statutes is that they shall not be construed to be retrospective unless the retrospective intention is expressed, or can be plainly gathered from the provisions of the act. But it seems to us that the language of this ordinance is plain and unequivocal. When it is said that all hotels, office buildings, factories, tenements, and lodging houses more than three stories in height, shall have a certain described fire escape, it seems to us it was the plain intention of the city council that all buildings described should have such appurtenances, and that, if it had been the intention to except any buildings from its provisions, such exception would have been expressed. The language is as broad and comprehensive as could well have been used. In reason, too, it would seem that, if the city council, from observation or investigation, had determined that a certain character of fire escape was necessary for the preservation of people inhabiting certain classes of houses, it would be as important in the interest of the safety of the inhabitants of such houses to apply the rule to houses already built as to those thereafter built. There can be no doubt as to the constitutionality of this act under this construction.

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And there is no merit in the contention that the respondent had any inherent or vested right because he had complied with the law existing at the time he built. There is no such thing as an inherent or vested right to imperil the health or impair the safety of the community. But to be protected against such impairment or imperilment is the universally recognized right of the community in all civilized governments—a protection which the government not only has a right to vouchsafe to the citizens, but which it is its duty to extend in the exercise of its police power. When the subject of legislation is a proper subject of such exercise, as in this case it undoubtedly is, private rights are always held subservient to the public weal, and the legislature must be the judge of the propriety or extent of the remedy. The object of this ordinance was to protect persons from fire, and while it is agreed that the fire escape already existing was in working order, it is also stipulated that it was not as convenient or safe for use as the stairway provided for by the ordinance. The people have a right to the safest method that can be found and determined by the legislature. Conditions in cities in relation to buildings are constantly changing. Dangers from fire are increasing by reason of the change in the construction of buildings, and for many other reasons which might be conceived. In addition to this, mechanical science is making known safeguards, apparatus, and methods of extinguishing fires which were not known before. Theaters and other public buildings are built with certain kinds and characters of fire escapes, which in emergencies are found to be faulty, and not the best that could be used. It would be a sad commentary on the law if municipalities were powerless to compel the adoption of the best methods for protecting life in such cases, simply because the confessedly faulty method in use was the method provided by law at the time of its construction. The changing of fire escapes is only an incident in the expense of the construction or repair of a building.

The same reason that impelled the court in *Buffalo v. Chadeayne*, 134 N. Y. 163, 31 N. E. 443, to hold that the ordinance in that case applied only to buildings thereafter to be constructed, would not apply here. There the question came up on an ordinance preventing the erection of wooden houses within certain fire limits. At the time the houses were built, or partly built, they were built under the sanction of the authorities, and after the work had been partly accomplished and the contracts let, the fire limits were changed; and the court very properly held that the charter authorizing the making of ordinances by the common council "to prescribe the limits within which wooden buildings shall not be erected," pertained to the future, and that an ordinance made thereunder, prohibiting, without the council's permission, the erection of "any building constructed in whole or in part of wood within certain limits," referred to buildings to be erected in the future, and not to buildings in existence and erected by such permission.

However, this question was squarely decided in *Commonwealth v. Roberts*, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400, a sewage case, where it was held that the act applied to houses built after the act went into operation, as well as those having been constructed before. The language of that act was as follows:

"Every building in the city of Boston used as a dwelling, tenement, or lodging house, or where persons are employed, shall have at all times such number of good and sufficient water-closets," etc.,

and the court, in speaking of the act, says:

"The defendant contends that the act was not intended to apply to houses already built when the act went into operation. But while the act is broad enough to apply to all buildings, the language of the section imposing a penalty on 'any person violating any provision of this act' . . . is prospective in its operation, and applies to violations which continue after its passage, or which then come into existence."

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The court further says:

"The defendant, however, contends that, as her structure was lawful when built, an act of the legislature which would render its use unlawful would be unconstitutional, citing *Commonwealth v. Alger*, 7 Cush. 53, 103. The statutes there in controversy related to harbor lines in Boston, and were not police regulations affecting the public health; and the language of Chief Justice Shaw in that case does not apply to a case like the one now under consideration."

It will be noted that the section imposing the penalty in the case at bar provides that any owner, builder, etc., who shall construct, alter, repair, etc., or who shall violate any provision thereof, shall be subject to a fine, etc. If the act were to be construed to apply only to the construction, alteration, or repair of buildings after the passage of the act, there would have been no room for the further expression, "or who shall violate any provision thereof." Construing the sections of the ordinance together, and taking into consideration what must have been the reason for the passage of the ordinance, we are forced to the conclusion that it was the intention of the council to make the provision in relation to fire escapes uniform and universal, as applied to the classes of houses mentioned therein.

The judgment will be reversed.

MOUNT, C. J., ROOT, FULLERTON, HADLEY, and CROW, JJ., concur.

RUDKIN, J. (concurring)—I concur in the construction placed on the city ordinance in the majority opinion, but, if the reversal of the judgment carries with it the implication that the respondent may be retried for the same offense, I express no opinion on that question.

40	474
40	684
40	685

[No. 5700. Decided November 13, 1905.]

THE STATE OF WASHINGTON, *on the Relation of A. L. Plaisie,*
et al., Appellant, v. M. M. COLE, *as Justice of*
*the Peace, etc., Respondent.*¹

APPEAL—MANDAMUS—AMOUNT IN CONTROVERSY—JURISDICTIONAL REQUISITE. The supreme court has no jurisdiction of an appeal from a judgment of the superior court in a proceeding for a mandamus to compel a justice of the peace to grant a change of venue, where the original amount in controversy was less than two hundred dollars.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered August 29, 1904, denying on the merits an application for a writ of mandamus to compel a justice of the peace to grant a change of venue. Appeal dismissed.

Million & Houser, for appellant.

RUDKIN, J.—Max Boynton commenced an action before one of the justices of the peace of Skagit county, to recover the sum of \$27.77. Defendants appeared in the action and filed an affidavit to the effect that they believed that they could not have a fair and impartial trial before said justice, and demanded a change of venue. The change of venue was granted, and the papers in the case transmitted to another justice of the peace of said county, as provided by law. The defendants appeared before the justice to whom the case was transferred, and filed a second affidavit of like import, and demanded a second change of venue. The demand for a second change of venue was denied. The defendants refused to appear further, and judgment was taken against them in the sum of \$27.77 and costs of suit. Execution issued on this judgment, and the property of the defendants was seized to satisfy the same. The defendants thereupon applied to

¹Reported in 82 Pac. 749.

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Opinion Per RUDKIN, J.

the superior court for a writ of mandate against the justice of the peace to whom the case was transferred, to compel him to award the second change of venue as prayed. The court denied the writ, and the relators have appealed to this court.

No brief has been filed by or on behalf of the respondent. Has this court jurisdiction of this appeal? In *Parrish v. Read*, 2 Wash. 491, 27 Pac. 230, 28 Pac. 372; *State ex rel. Shannon v. Hunter*, 3 Wash. 92, 27 Pac. 1076; *State ex rel. Maltby v. Superior Court*, 7 Wash. 223, 34 Pac. 922; *State ex rel. Pacific Coast S. S. Co. v. Superior Court*, 12 Wash. 548, 41 Pac. 895; *Mudgett v. Liebes*, 14 Wash. 482, 45 Pac. 92; *State ex rel. Brown v. Superior Court*, 15 Wash. 314, 46 Pac. 232; *State ex rel. Smith v. Neal*, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135; and *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207, this court entertained original or appellate jurisdiction of mandamus proceedings where the original amount in controversy was less than \$200. The question of jurisdiction does not seem to have been raised or decided in any of these cases. In *State ex rel. McIntyre v. Superior Court*, 21 Wash. 108, 57 Pac. 352, it was held, after full consideration, that this court had no jurisdiction of a mandamus proceeding to compel the superior court to reinstate an appeal which it had theretofore dismissed, where the amount in controversy in the original action was less than \$200. In discussing the question of jurisdiction, the court said:

“It is true that the constitution (art. 4 § 4) provides that the supreme court shall have original jurisdiction in habeas corpus, *quo warranto* and mandamus as to all state officers; but that provision must be construed in relation to the other provision just mentioned, which was intended as a limitation upon the jurisdiction of the supreme court. It certainly was not the intention of the framers of the constitution, and would not be in harmony with any consistent theory of adjudication, to hold that a litigant could obtain the opinion of this court by mandamus upon a question of law, where he would be precluded from obtaining it upon appeal; or, in other words,

that he would be placed in a better position by reason of the amount involved in the litigation falling under \$200 than if it exceeded that amount. The idea of the constitution evidently is that cases involving small amounts can safely be entrusted to the final judgment of the superior court, and that as to such cases the superior court is the court of final determination."

This case was followed and approved in *State ex rel. Wallace v. Superior Court*, 24 Wash. 605, 64 Pac. 778, on a similar state of facts. In *State ex rel. Dudley v. Daggett*, 28 Wash. 1, 68 Pac. 340, the court held that it had appellate jurisdiction of a mandamus proceeding notwithstanding the amount in controversy was less than \$200. The decision seems to have been based on the ground that mandamus is not a civil action at law for the recovery of money, within the meaning of the constitutional provision limiting the jurisdiction of this court. The court cites *Mudgett v. Liebes*, and *State ex rel. Smith v. Neal*, *supra*, but makes no reference to *State ex rel. McIntyre v. Superior Court* or *State ex rel. Wallace v. Superior Court*. In certiorari, review, and kindred proceedings, this court has uniformly held that it has no jurisdiction where the original amount in controversy is less than \$200 (*State ex rel. Gillette v. Superior Court*, 22 Wash. 496, 61 Pac. 158; *State ex rel. Bassett v. Freasure*, 39 Wash. 198, 81 Pac. 688), and we see no reason why mandamus should be an exception to this rule.

The facts in this case would seem to demonstrate the correctness of the rule laid down in the *McIntyre* case. The amount sued for is less than \$30. Why should the parties be permitted to bring such a controversy before this court under the guise of mandamus, when the framers of the constitution manifestly intended that the judgments of the superior courts should be final in all such minor controversies? After a re-examination of the question, we are satisfied that the rule laid down in *State ex rel. McIntyre v. Superior Court*, and *State ex rel. Wallace v. Superior Court*, *supra*, is

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the correct one, and the case of *State ex rel. Dudley v Daggett, supra*, is overruled in so far as it conflicts therewith or with the views herein expressed.

Appeal dismissed for want of jurisdiction.

MOUNT, C. J., FULLERTON, DUNBAR, CROW, HADLEY, and ROOT, JJ., concur.

[No. 5828. Decided November 14, 1905.]

REGINALD K. MCINTOSH, *Appellant*, v. R. MERCHANT *et al.*,
Respondents.¹

FACTORS—PRINCIPAL AND AGENTS—GOODS SHIPPED TO AGENT FOR SALE—SUBSTITUTION BY ACT OF AGENT—NOTICE—RATIFICATION BY FAILURE TO OBJECT. The act of a factor to whom merchandise was consigned for sale, in turning the goods over to and substituting a corporation which succeeded to his business, is ratified by the owner of the goods, where notice thereof was given shortly after the incorporation and nothing was done and no objection made for more than six months thereafter.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 22, 1905, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to recover for goods consigned to a factor to be sold. Affirmed.

Blaine, Tucker & Hyland, for appellant.

Fred H. Peterson and *H. C. Force*, for respondents.

HADLEY, J.—This was an action brought to recover the value of a quantity of beans. The cause was tried by the court without a jury, and findings of facts and conclusions of law were made and entered. No error is assigned upon the findings of facts, and the following, which were culled from the findings, may be taken as established facts in the case: On about May 12, 1901, the plaintiff shipped to the

¹Reported in 82 Pac. 753.

defendant R. Merchant one hundred and eighty-five sacks of beans, each of the sacks weighing about one hundred and sixty-two pounds, to be sold by said defendant for and on account of plaintiff, at not less than \$4.10 per hundred weight, said defendant acting as factor for and on behalf of plaintiff, and not otherwise. The said defendant was unable to sell the beans at the aforesaid price, and thereafter, on or about July 10, 1901, he delivered them to R. Merchant & Co., Inc., a corporation having its principal place of business at Seattle. Defendant Merchant was a stockholder in the corporation, and the purpose of the delivery to the corporation was that it might sell the beans for and on behalf of plaintiff.

On April 12, 1902, the defendant Merchant wrote to Durand Bros. & Co., agents of the plaintiff, at Vancouver, B. C., the following letter:

"I write to inform you that I am no longer connected with the firm of R. Merchant & Co., Inc., and you will have to look to the firm for your accounting on the beans which was turned over to them July 1st, 1901, when they incorporated. The members of the firm who have bought my stock and all interest in the company and say they will form a new company are H. S. Shook, Thos. A. McKay and John Day at present, but I am told they will take in other stockholders, and there is but a few sacks of beans sold, and I think some of the parties are much dissatisfied with your price and I advise you to look after the matter. I believe they can be sold at \$2.85 or \$3 but not more. Write me at above location at present."

The said letter was received by Durand Bros. & Co. in due course of mail, and for more than six months thereafter they made no reply thereto, by mail or otherwise. In the month of October, 1902, a member of said firm came to Seattle, and conversed with Merchant about the beans, but no other or different action was taken by them or the plaintiff. From the foregoing facts, the court entered its conclusion of law to the effect that the plaintiff, in not making any objection to the disposition of the merchandise, as made by defendant

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Merchant, for more than six months after the receipt of said letter by plaintiff's agents, thereby ratified Merchant's acts, and that he was, by reason thereof, relieved from liability. Judgment was rendered for the defendants, and the plaintiff has appealed.

It is assigned that the court erred in its conclusion of law, and in rendering judgment for the defendants. Appellant contends that the respondent Merchant was the only authorized agent of appellant; that, when he received the beans as such agent and afterwards delivered them to R. Merchant & Co., Inc., of which delivery appellant was not notified until some months afterwards, said respondent thereby substituted another agent without authority. On the other hand, respondents' argument is, that appellant was notified of the substitution, that he did not, within a reasonable time thereafter, make any objection, and that he should now be held to have ratified the substitution. In this view we concur. If appellant had promptly, and within reasonable time after receiving notice of the substitution, objected thereto and expressly refused to ratify it, said respondent might then have taken immediate steps to protect himself, either by securing a redelivery to him of the beans, or otherwise. As it was, however, by appellant's silence for months, respondent Merchant was lulled into the belief that the substitution was satisfactory. This court recently said, in *Allen v. McAllister*, 39 Wash. 440, 81 Pac. 927:

"If the letters of the respondent can be held to amount to an instruction to sell the wool, and if the failure of the appellant to sell it as instructed can be held to be a departure from these instructions, such departure must be held to be ratified, because the principal expressed no disapproval within a reasonable time."

The general rule relating to ratification by silence of the principal, when the agent has departed from instructions, is not confined merely to a sale below the price fixed by the principal, but it also includes other violations of instructions.

12 Am. & Eng. Ency. Law (2d ed.), 653, and cases cited. In *Field v. Farrington*, 10 Wall. 141, 19 L. Ed. 923, the court said:

"The effect of his refusal to reply to their letter within a reasonable time after he received it, was undoubtedly to raise a presumption that he approved of what his factors had done, so far as their letter informed him. In the absence of anything to rebut that presumption, he must be regarded as having consented to whatever delay had occurred in effecting a sale, even though it was contrary to his directions. He could not, therefore, hold his factors responsible for the consequences of acts which he had ratified."

See, also, *Dunbar v. Miller*, Fed. Cas. No. 4,130; *Austin v. Ricker*, 61 N. H. 97.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5804. Decided November 14, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. JOSEPH W. CAMPBELL, *Appellant*.¹

CRIMINAL LAW—FORMER JEOPARDY—DISMISSAL OF CHARGE FOR MISDEMEANOR AS BAR TO INFORMATION FOR FELONY—STATUTES—CONSTRUCTION. The constitutional prohibition against placing a person twice in jeopardy is not violated by the filing of an information charging an assault with intent to commit murder, after the dismissal of a prosecution for exhibiting a dangerous weapon, which is a misdemeanor only; since Bal. Code, § 6916, providing that the dismissal of a prosecution for a misdemeanor shall be a bar to a further prosecution was not intended to apply to prosecutions for felony, and since the misdemeanor named was not necessarily included in the later charge.

CRIMINAL LAW—INFORMATION—DEGREES OF OFFENSE. A charge of exhibiting a dangerous weapon is not necessarily involved in the crime of assault with intent to commit murder, and a dismissal of the former charge is not a bar to a prosecution of the latter.

¹Reported in 82 Pac. 752.

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Opinion Per DUNBAR, J.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered December 27, 1904, upon a trial and conviction of the crime of assault with intent to commit murder. Affirmed.

W. H. Abel and *A. M. Abel*, for appellant.

E. E. Boner, for respondent.

DUNBAR, J. — On August 3, 1904, an information was filed against the appellant, charging him with exhibiting a dangerous weapon in a rude, angry, and threatening manner, etc., in a crowd of two or more persons. On November 25, 1904, the prosecuting attorney filed a motion to quash this information, which motion was granted by the court, and an information was filed charging the defendant with an assault with intent to commit murder. The court certified that the said information was dismissed for the purpose of permitting the prosecuting attorney to file the latter information, and that the same facts and transactions were included in both informations, and that each information was based on the same facts and transactions. Upon the filing of the last information, the appellant filed a plea in abatement, introducing the first information and the dismissal of the same for the purpose of sustaining said plea. The plea in abatement was overruled, the cause proceeded to trial, and a conviction was had upon the last information, and the defendant was sentenced to one year in the penitentiary.

The appellant contends that the court erred in refusing to dismiss this action, and in failing to hold that the dismissal of the former criminal action constituted a bar. It is contended that exhibiting a dangerous weapon is a misdemeanor only, and that, under Bal. Code, § 6916, the dismissal of the first information charging a misdemeanor was a bar to another prosecution for the same offense, and appellant relies

upon the case of *State v. Durbin*, 32 Wash. 289, 73 Pac. 373, to sustain his contention. The statute is as follows:

“An order for dismissal as provided in this chapter is a bar to another prosecution for the same offense, if it be a misdemeanor; but it is not a bar if the offense charged be a felony.”

The writer of this opinion did not indorse the construction placed by the court upon this statute in *State v. Durbin*, *supra*, but, even conceding the soundness of the doctrine announced in that case, it does not sustain the contention of the appellant in this. What was really decided in that case was that, where a party had been charged with assault and battery, and a *nolle prosequi* had been entered to such information for the purpose of allowing the prosecuting attorney to file an information charging the defendant with mayhem based upon the same state of facts, and where, upon the trial on the last information, the defendant was found guilty of assault and battery, such a proceeding was equivalent to trying the defendant twice for the same offense.

But it will not do to lay down a rule to the effect that, in a case where, through inadvertence or misinformation of a prosecuting officer, a defendant has been charged with a misdemeanor—for instance, an assault and battery—and it afterwards eventuates that the actual crime committed was that of an assault with intent to commit murder, or even murder, the law must be content with punishing the defendant for the crime of assault and battery or allow him to escape punishment altogether, by reason of the inability of the state to dismiss the action for assault and battery and indict for the greater offense. Such a determination by a court would surely be the clogging, instead of the lubricating, of the wheels of justice.

While much has been said on this question of former acquittal and former conviction, there is no authority that goes further than to hold that, where the minor offense with which the defendant is charged is necessarily included in the greater

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offense—so that the jury upon the trial of the greater offense would be warranted in finding for the less offense—the acquittal for the less offense would be a bar to a trial for the greater offense; and this can only be based upon the theory that the defendant, having been acquitted of the lesser offense, could not be convicted of the greater offense, because the commission of the lesser offense was a constituent element in the perpetration of the greater offense. It will be noticed in this case that it does not fall within any of the rules constituting a bar to an action for a greater offense, because the crime of exhibiting a dangerous weapon in a rude, angry, and threatening manner is not necessarily involved in the crime of an assault with intent to commit murder; and a jury, in the trial of an information charging that crime, could not find the defendant guilty of the crime of exhibiting the dangerous weapon.

This question was before this court in *State v. Reiff*, 14 Wash. 664, 45 Pac. 318, where it was held that the constitutional prohibition against placing a person twice in jeopardy for the same offense was not violated by a second prosecution of one for a separate and distinct offense based upon a different statute, the penalty prescribed for the violation of which is different from that imposed by the statute under which the first information was laid, although the acts upon which the two prosecutions are based were the same. It was also held that, to sustain the plea, the offenses must be identical, both in fact and in law; that there was a distinction between twice placing a person in jeopardy for the same offense, and a second prosecution of one for a separate and distinct offense based upon a different statute the penalty prescribed for the violation of which is different from that imposed by the statute under which the first information was laid; and that the test was not whether the defendant had already been tried for the same act, but whether he had been put in jeopardy for the same offense.

We think that, under all authority, the court properly denied the plea in abatement. The judgment is affirmed.

MOUNT, C. J., ROOT, CROW, HADLEY, and RUDKIN, JJ., concur.

FULLERTON, J. (dissenting).—This case cannot be distinguished in principle from the case of *State v. Durbin*, and ought to be reversed unless that case is overruled. As I think that case correctly interprets the statute, I dissent from the conclusion reached in this one.

[No. 5844. Decided November 14, 1905.]

RACHEL STEVENS *et al.*, Appellants, v. WILLIAM JONES *et al.*,
Respondents.¹

APPEAL—CESSATION OF CONTROVERSY—SURRENDER OF PREMISES IN FORCIBLE ENTRY AND DETAINER. An appeal from a judgment for defendants in an action of forcible entry and detainer will be dismissed where, pending the action, the plaintiff conveyed the property to third persons, who intervened and to whom the defendants yielded possession upon demand before the hearing of the appeal; since there is no longer any controversy.

FORCIBLE ENTRY AND DETAINER — DAMAGES — CONVEYANCE PENDING SUIT. The plaintiffs' right to damages in an action of forcible entry and detainer is personal and only incident to the possession, and is lost by a conveyance of the property before judgment.

APPEAL—CESSATION OF CONTROVERSY—COSTS. The supreme court will not entertain an appeal for the purpose of determining a question of costs.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered February 17, 1904, in favor of the defendants, upon motion for judgment on the pleadings, after striking a complaint in intervention, in an action of forcible entry and detainer; also, from the order striking the complaint in intervention aforesaid. Appeal dismissed.

¹Reported in 82 Pac. 754.

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Opinion Per Curiam.

Million & Houser, for appellant Stevens.

Hurd & Brickey, for interveners.

Smith & Brawley, for respondents.

PER CURIAM.—The plaintiff, Rachel Stevens, brought this suit under the forcible entry and detainer law, to recover possession of certain real estate, from the defendants William and Anna Jones. The complaint alleges such facts concerning the possession of the defendants and notice to quit and surrender as show a *prima facie* right to recover. The defendants answered that, prior to the commencement of the suit, the plaintiff had, by warranty deed, conveyed the land to A. J. and Emily Lawson. The plaintiff replied, admitting such conveyance. The Lawsons then asked and obtained leave to intervene in the action. Their complaint in intervention alleges that the land has been conveyed to them, and that they are entitled to the possession thereof. The defendants moved to strike the complaint in intervention, which motion was granted; and thereupon the court, in consideration of the complaint, answer, and reply, granted a motion interposed by defendants for judgment upon the pleadings. Judgment of dismissal was entered, and costs against the plaintiff were awarded to the defendants. The plaintiff and, also, the interveners have appealed.

We shall not discuss the legal questions involved in the appeal, for the following reasons: Respondents' brief, in answer to that of appellants Lawson, interveners below, contains the following statement:

"The respondents knew that appellant Stevens had parted with her title, that they were no longer her tenants, but were the tenants of the Lawsons. And they had a perfect right under the law to retain possession of the premises until their landlord made some demand or gave them some notice that he desired possession, before they can be mulcted in costs and damages. Had the appellants Lawson done this, the possession would have been delivered immediately, as the respondents did so immediately upon such request being made."

The above statement was repeated in oral argument, and was not controverted either by reply brief or at the time of the oral argument. It therefore stands admitted that respondents have yielded possession to the appellants Lawson. The subject-matter of the controversy was the possession of the land, and inasmuch as it stands admitted that possession has been yielded to the Lawsons, the controversy has therefore ceased, as between them and respondents. Appellant Stevens concedes that the Lawsons were entitled to possession when she commenced her suit. Any claim she may have had for damages could be waged in this summary action only as an incident to her right to possession. The right to damages is a personal one, and when unaccompanied with the right to recover possession, must be waged in an ordinary civil action. There is, therefore, no longer any controversy between respondents and any of the appellants in this action. Certainly no controversy remains unless it pertains to questions of costs in the case, and this court has repeatedly refused to entertain appeals, after the main controversy ceased, for the mere purpose of determining matters of costs.

The appeal is therefore dismissed.

[No. 5845. Decided November 14, 1905.]

CALVIN C. DEATON, *Respondent* v. O. V. LAWSON *et al.*,
Appellants.¹

PHYSICIANS AND SURGEONS—OWNER OF MEDICAL INSTITUTE HAVING NO LICENSE—CONTRACT TO PERFORM PROFESSIONAL SERVICES—VALIDITY—CONSIDERATION. A contract made by the owner of a "medical institute" to render professional services, cure diseases, and give medical treatment, is void as against public policy and in violation of law, where such owner has no license to practice medicine, and the physician in charge had nothing to do with making the contract, and had no connection with the institute except as an employee on a salary.

¹Reported in 82 Pac. 879.

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Opinion Per RUDKIN, J.

ASSIGNMENTS—CONTRACTS ASSIGNABLE. A contract for medical treatment is personal and non-assignable.

CONTRACTS—INVALIDITY—RECOVERY OF MONEY PAID. Money paid on an executory contract for medical treatment, to a person having no license to practice, and void as against public policy, may be recovered.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 2, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover money fraudulently obtained. Affirmed.

Graves, Palmer, Brown & Murphy, for appellants.

Sweeney & Steiner for respondent.

RUDKIN, J.,—On the 18th day of March, 1903, the plaintiff and the defendant O. V. Lawson entered into the following written contract:

"This contract and agreement, entered into this 18th day of March, 1903, by and between the officers of the State Medical Institute, and the physician in charge, located at Seattle, State of Washington, the party of the first part, and C. C. Deaton, of Seattle, Washington, the party of the second part;

"Witnesseth: That the party of the first part agrees and contracts to render professional services to the party of the second part until the party of the second part shall be cured of a certain disease, concerning which the party of the second part has this day consulted the party of the first part.

"The party of the second part, for and in consideration of the above agreement, does hereby agree and contract to pay the party of the first part, the sum of _____ dollars (\$469) as follows, viz., by cash, \$469.

"It is also agreed that the party of the second part follow directions carefully, and to take the medicines and remedies as prescribed from time to time by the party of the first part, until a complete cure is effected.

"In Witness Whereof, The respective parties have hereunto set their hands and seals this 18th day of March, 1903.

"C. C. DEATON.

"S. M. INST."

The circumstances leading up to the execution of this contract, as detailed by the plaintiff, are these: The plaintiff, at the time, was suffering from indigestion and other ills, and called at the office of the State Medical Institute for treatment. He there consulted with the defendant Lawson and with Dr. Richards, a physician in the employ of the defendant, and they guaranteed to cure him within three months for the sum of \$85. When the plaintiff came to pay the defendant Lawson he exhibited a considerable sum of money in addition to the \$85. On sight of such additional sum, the defendant Lawson forthwith represented to the plaintiff that he could give a different treatment which would effect a permanent cure within six weeks, but that it would cost more. The above contract is the result. The plaintiff received some medicine on the day of the execution of the contract, and returned on the following day for further treatment as directed. On the evening of the second day he told his father what he had done, and his father refused to permit him to take further treatment from the defendants. After this the plaintiff never returned to the defendants' office, and refused to take further medicine or receive further treatment from them. This action was brought to recover the money paid under the contract.

The pleadings admit that the State Medical Institute is owned, operated, managed, and controlled by the defendant Lawson. The execution of the contract and the payment of the \$469 are also admitted. The court found, that the defendant Lawson was not entitled to practice medicine under the laws of the state of Washington, not having a license to so practice, as provided by the statutes of said state; that the State Medical Institute has in its employ one Dr. Richards, a regularly licensed physician; that the said Lawson fixed the fees and charges against the plaintiff, collected the same, and signed the written contract upon the part of the State Medical Institute; and that Dr. Richards had nothing

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whatever to do with fixing the fees or charges, or in making the contract with the plaintiff. The court further found,

"That the sum of \$85 was a reasonable charge for the services agreed to be rendered to the plaintiff, but that the additional charge of \$384 was excessive, and that plaintiff's mental and physical condition was such that he was not capable of entering into any kind of a contract, and that said purported written contract for this reason is void."

On these findings, the court rendered a judgment in favor of the plaintiff for the sum of \$384. The defendants appeal.

The appellants earnestly insist that the finding that the respondent was not capable of entering into any kind of a contract, and that the fees charged were excessive, is without the issues raised by the pleadings, and is not supported by the testimony. If the judgment of the court finds no support in the record aside from this finding, it would be difficult to sustain it. We think, however, that the judgment is amply supported on other grounds. The findings of the court and the entire testimony clearly show that this was the personal contract of O. V. Lawson. The reference in the body of the contract to the State Medical Institute, its officers, and the physician in charge, and the claim of the appellant Lawson that he signed the contract as secretary for Dr. Richards, are but so many pretenses to evade the laws of the state.

It is admitted in the pleadings that the State Medical Institute is owned, operated, managed, and controlled by Lawson. In other words, he is doing business under that name. It is further shown that Dr. Richards was not a party to the contract, and was in no manner obligated to perform it. The court finds, and he himself testifies, that he has no connection, directly or indirectly, with the State Medical Institute, has nothing to do with the making of contracts, or the fixing of fees, but is simply employed on a salary. If we should sustain the claim of the appellant Lawson that he signed the contract as secretary for Dr. Richards, we have no contract at all, as the record clearly shows that he had no authority in

that behalf. Stripped of all subterfuges and pretenses, this is neither more nor less than a contract on the part of appellant Lawson to render professional services for the respondent, a contract he could not perform without violating the laws of the state. The contract was therefore against public policy, and is utterly void.

A contract to render professional services is personal and non-assignable. No person can perform or tender performance except the person therein named, without the consent of the other party to the contract. Inasmuch as the appellant Lawson could not perform his part of the agreement without violating the laws of the state, there was no consideration for the alleged contract or the payment of the money thereunder, and the respondent is entitled to recover the money so paid, so long as the contract remains executory. The fact that he was not awarded as much as he was entitled to under the law is no ground for reversal.

There is no error in the record and the judgment is affirmed.

MOUNT, C. J., DUNBAR, CROW, FULLERTON, HADLEY, and ROOT, JJ., concur.

[No. 5355. Decided November 15, 1905.]

MONTESANO NATIONAL BANK, *Respondent*, v. J. A. GRAHAM,
*as Sheriff of Chehalis County, Appellant.*¹

CONVERSION — ACTION AGAINST SHERIFF — TITLE TO PROPERTY LEVIED ON — CONTRACT — WHEN NOT A CONDITIONAL SALE — NOTICE TO EXECUTION CREDITORS — FINDINGS — EVIDENCE — SUFFICIENCY. In an action for the conversion of sawlogs levied upon by a sheriff, in which the plaintiff claimed absolute ownership through a written contract from the judgment debtor, the fact that the contract was not filed as a chattel mortgage or as a conditional bill of sale, and was therefore void as to creditors, is immaterial, when the court finds, upon compe-

¹Reported in 82 Pac. 881.

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Opinion Per MOUNT, C. J.

tent evidence, that the plaintiff was the absolute owner of the property, and the creditors became such after the execution of the contract and with notice thereof.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered May 10, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for conversion. Affirmed.

W. H. Abel, for appellant.

B. G. Cheney, for respondent.

MOUNT, C. J.—This action was brought by the respondent to recover damages from appellant on account of an alleged conversion of certain cedar sawlogs. The complaint alleged ownership of the logs in respondent, and a conversion by appellant, and damages in the sum of \$600. The answer was a general denial of the allegations of the complaint, and a plea of ownership of the logs in one J. A. Dennis, and also a levy and sale of said logs, on execution to satisfy a judgment in favor of Creech Brothers, against said Dennis. Upon these issues a trial was had to the court without a jury. Thereupon the court found that the property was the property of the respondent, and was of the value of \$300, and entered judgment for that amount against appellant. This appeal is prosecuted from that judgment.

Respondent at the trial asserted ownership of the logs in question by virtue of a contract with the above named J. A. Dennis, which contract is set out in full in *Dennis v. Montesano Nat. Bank*, 38 Wash. 435, 80 Pac. 764, and need not be again copied here. The following stipulation was entered into at the trial:

“It is stipulated that on April 17, 1902, the plaintiff filed said contract, being plaintiff’s exhibit No. 1, as a miscellaneous instrument in the office of the auditor of Chehalis county, Washington; but never filed the same as a chattel mortgage or as a conditional sale contract; that said

contract was at the instance of plaintiff placed on file in the auditor's office by the county auditor of Chehalis county, as a miscellaneous instrument, and not otherwise, and was recorded and indexed as a miscellaneous instrument at plaintiff's instance, and was not indexed or filed or recorded as a chattel mortgage nor as a conditional sale contract; that the index of said instrument was made by entering in the general index in said auditor's office, in the grantor's column the words, 'J. A. Dennis;' in the grantee column the words, 'Montesano National Bank;' in the date column the words, 'April 17, 1902,' and in the column entitled, 'Nature of Instruments,' the word, 'Misc.,' and in the reference column the words, 'Form 21, Misc., page 431;' and that said index was the only entry upon the indices kept by the auditor of Chehalis county."

Appellant contends that, because the contract above referred to was not in form a chattel mortgage or recorded as such, and was not recorded as a conditional bill of sale, it was void as to Creech Brothers, who were creditors of said Dennis. The statute and many authorities are cited to sustain the position that a chattel mortgage or conditional bill of sale, not in the form required by statute, and not recorded or filed as required by law, is void as to creditors. But neither of the contentions made by appellant is applicable to this case, because the respondent is not claiming a mere lien upon the logs, by virtue of a chattel mortgage or a conditional bill of sale, but is claiming the absolute ownership of the logs. The right of respondent to maintain the action depends entirely upon the fact whether or not he is the owner. This was the main question in the case, and upon the evidence the trial court found that he was the owner.

The case of *Dennis v. Montesano Nat. Bank*, *supra*, was a case between Dennis and the bank to determine the ownership of the property in dispute in this case, and also other property; and we there held that the property in dispute here was, by the terms of the contract, the property of the bank. The evidence in this case shows that Creech Brothers

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became creditors of Dennis after the execution of the contract, and with actual notice and knowledge of the contract, and that the levy was made by the sheriff at the instance of Creech Brothers, after notice that the bank claimed to own the property. Under the evidence, which supports the finding that the respondent was the actual owner of the property and not a lien claimant, the points made by the appellant, and the authorities cited in support thereof, become inapplicable to this case.

The judgment appealed from is therefore affirmed.

DUNBAR, ROOT, FULLERTON, HADLEY, CROW, and RUDKIN, JJ., concur.

[No. 5774. Decided November 16, 1905.]

CHARLES T. TERRY, *Appellant*, v. JACOB FURTH *et al.*,
Respondents.¹

MORTGAGES—FORECLOSURE—ACTION TO SET ASIDE SALE—EVIDENCE AS TO DATE—SUFFICIENCY. A decree of foreclosure should not be set aside, after seven years has intervened, on slight testimony that the sale was advertised for a certain day, and in fact took place on the following day; and findings sustaining the sale will not be disturbed where the testimony was not conclusive either way.

SAME—IRREGULARITIES—CONFIRMATION OF SALE—FAILURE TO OBJECT. The confirmation of a sale of real estate is conclusive as to the regularity of the sale, upon an action to set aside the confirmation for irregularities.

MORTGAGES—JUDICIAL SALE—SETTING ASIDE—FRAUD—SUFFICIENCY OF SHOWING. An action to set aside the confirmation of a sale of real estate for fraud cannot be sustained where the fraud shown was connected with the execution of the mortgage, and the only objection to the sale is that it was not had on the day advertised, and there is no claim of fraud in connection with the date of the sale.

SAME—LACHES OF OWNER—EXCUSE FOR DELAY. Removal from the state previous to a sale of real estate under a decree of foreclosure is not a sufficient excuse for failure to file objections to the confirmation of the sale within the time required by law.

¹Reported in 82 Pac. 882.

Appeal from a judgment of the superior court for King county, Morris, J., entered March 28, 1905, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to set aside a mortgage foreclosure sale. Affirmed.

Richard Saxe Jones and William H. Brinker, for appellant.

Harold Preston and L. C. Gilman, for respondents.

DUNBAR, J.—This is an action in equity to set aside a foreclosure sale and the confirmation of the sale, and to cancel a sheriff's deed resulting therefrom. There is no question raised as to the legality of the foreclosure of the mortgage involved, but the contention is that the sale was advertised to be made on the 25th of June, 1897, when in fact it was made on June 26th, 1897. This action to set aside this sale was brought in June, 1904. The court found that the sale was made in accordance with the advertisement, on the 25th day of June, 1897.

This was a pure question of fact, determined by the court upon testimony presented, and it would be profitless to enter into a discussion or analysis of that testimony; but from an examination of the testimony, we are unable to say that the finding of the court was not justified. A sale of real estate is a matter of so much importance to the purchaser, and to those whose titles are deraigned from him, that it should not be set aside on slight testimony, especially where seven years have intervened between the sale and the application to set aside the sale. The inconveniences and trouble which arise from the upsetting of judicial determinations of this kind are illustrated in this case, where there are some forty defendants alleged to have an interest in the action, comprised of individuals, administrators, executors, and corporations of various kinds. And from an examination of the testimony, we are unwilling to disturb the judgment, or the

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finding of the lower court in regard to the date of the sale, the testimony not being of a conclusive nature on either side.

In addition to this, our statute provides (Pierce's Code, § 879) that an order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons in any other action, suit, or proceeding whatever. This statute was given a literal interpretation by this court in *State ex rel. Steele v. Northwestern etc. Bank*, 18 Wash. 118, 50 Pac. 1023; and the very question at issue in this case was decided by this court, in opposition to appellant's right to disturb the confirmation in this case, in *Otis Bros. & Co. v. Nash*, 26 Wash. 39, 66 Pac. 111, and the judgment of the lower court in that case was reversed because of an irregularity in the manner of the sale, this court saying:

"If any such irregularity existed in this case, it should have been suggested by way of an objection to the confirmation. . . . All these irregularities were cured by the order of confirmation. Having regard to the stability of real estate titles, an order confirming a sheriff's sale must be held to be more than a mere formal order. It is the solemn declaration of the court that the sale has been regularly and legally made, and those who would be in position to avoid the consequences of such order must pursue the method outlined by statute by making objections in time, so that the entry of the order may be prevented, or, if entered, may be reviewed by the appellate court if desired."

It is contended by the appellant that this case is not in point, for the reason that it was indicated in that case that a different rule might have prevailed if the petition had been for the purpose of setting aside the confirmation, instead of vacating the sale. But the opinion does not justify such a conclusion, for the court on that branch of the case said:

"If the petition be treated as an objection to confirmation, the court could not consider it, because it was not filed within the time required by law. If it was intended as an objec-

tion to confirmation, it should at least have shown an excuse for the delay in its filing."

But the whole case was to the effect that the irregularities of the sale were cured by the confirmation, and it will be conceded that the matter complained of in this case is an irregularity.

It is, no doubt, true that fraud vitiates everything, and that if it appears that a judgment was obtained by fraud, and that the action to set aside was promptly brought after the fraud became known, equity would probably right the person upon whom the fraud was perpetrated. But, while there are some allegations of fraud in this case, they relate to the manner in which the mortgage was obtained, and not to the transaction of the sale; and all those matters are practically abandoned upon this appeal, and there is really no testimony justifying them, because it is asserted by the appellant in his brief that the only question at issue here is whether the sale occurred upon the 25th or upon the 26th, and that, if this court finds that the sale actually occurred upon the 25th, the judgment should be sustained, otherwise that it should be reversed; and there is no allegation or claim that there was any fraud in changing the time of sale.

There is no sufficient excuse offered by the appellant for not urging the objections that he urges here, upon the confirmation. It is true, he says that before the sale he removed to California and stayed there for six years, but it does not appear that he left the state before the notice of sale; and removal from the state was held not to be a sufficient excuse for not urging irregularities at the confirmation of the sale in a case cited and approved by this court in *Otis Bros. & Co. v. Nash*, *supra*, viz.: *Leinenweber v. Brown*, 24 Ore. 548, 34 Pac. 475, 38 Pac. 4, an Oregon case, with a statute similar to ours, where the question of insufficient notice was raised as in this case. There it was admitted that, during all the time when the notice was being published, and when the sale was made and confirmed, the plaintiff Leinenweber

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was without the state of Oregon, and was within the state of California, and did not discover that the sale had been made until after the confirmation thereof. And it was held that, the plaintiff having failed to press her objections at the proper time and to show that she was prevented from doing so by fraud or deception, she was not entitled to relief by an independent suit.

We have examined the cases cited by the appellant, but do not think that they militate against the conclusion reached. The judgment is affirmed.

MOUNT, C. J., ROOT, CROW, FULLERTON, RUDKIN, and HADLEY, JJ., concur.

[No. 5838. Decided November 16, 1905.]

E. D. McMULLEN *et al.*, Respondents, v. E. ROUSSEAU *et al.*,
*Appellants.*¹

VENDOR AND PURCHASER—RESCISSION OF SALE FOR FRAUD—PARTIES. In an action for the cancellation of deeds for fraud, the party to whom the deed was made and who had conveyed to another, is a proper party defendant; nor could he complain of the joinder when no relief or costs were adjudged against him.

SAME—FALSE REPRESENTATIONS BY THIRD PARTY—PLEADING AND PROOF. In an action to cancel deeds for fraud, evidence of fraudulent representations made by a third party, who opened the negotiations on behalf of the defendant, which were afterwards repeated by the defendant, is admissible although not set forth in the complaint.

SAME—FALSE REPRESENTATIONS BY VENDEE—RIGHT TO RELY UPON INFORMATION NOT AT HAND. Where a conveyance of lands at a reduced price for the sum of \$200, was secured through fraudulent representations to the effect that they were wanted for a mill site, that the defendant had three carloads of mill machinery on the way, and sufficient lumber to keep the mill running ten years, and would furnish the grantor firewood free, and give him employment in the mill, the grantor had a right to rely on the statements and was not at fault in failing to discover the fraud, in view of the small amount involved; since the means of ascertaining the truth was not at hand.

¹Reported in 82 Pac. 883.

Appeal from a judgment of the superior court for Snohomish county, Yakey, J., entered April 5, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to cancel deeds and rescind a sale of land. Affirmed.

Israel & Mackay, for appellants.

John W. Miller and *M. J. McGuinness*, for respondents.

RUDKIN, J.—There is no controversy over the material facts in this case. On and prior to the 22d day of February, 1904, the plaintiffs were the owners of a tract of land, consisting of about one and one-half acres, in Ault's addition to South Snohomish, which the court below found to be of the value of \$262.50. The defendants Happell and wife owned an adjoining tract, and were desirous of acquiring the land of the plaintiffs for less than it was worth, or at least upon more favorable terms than they were willing to sell the same. Knowing that he could not acquire the land himself on satisfactory terms, the defendant Dan Happell employed the defendant Rousseau to acquire the land for him. Soon after this a stranger called on the plaintiffs, and represented to them that he was looking for a site for a shingle mill and box factory for himself and brother; that he and his brother were experienced mill men, and had been in the mill business for twenty years in the state of Michigan; that his brother was a wealthy man, and was then on his way from Michigan to this state, and would reach here in a few days; that the land of the plaintiffs suited him as a mill site; and that he desired to purchase the same from the plaintiffs for that purpose.

Soon after this, the defendant Rousseau called on the plaintiffs and represented that he was the brother to whom the stranger referred. He repeated the representations theretofore made, and further represented that he had three car loads of mill machinery on the way from Michigan; that he

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wanted the plaintiffs' land as a site for a shingle mill and box factory, and if he could purchase the same at a low figure he would set men at work in the construction of the mill in a few days; that he had been offered a free mill site at Everett, but the plaintiffs' land suited him better; that he owned timber enough to keep the proposed mill running for ten years, and that he would furnish the plaintiffs all the fire wood they needed from the mill free of charge; and that he would give the plaintiff E. D. McMullen employment in the mill at good wages.

The plaintiffs at that time asked \$350 for the land, but no sale was made. Thereafter the defendant Rousseau wrote the plaintiffs from Everett, offering \$200 for the land, and the plaintiffs, relying on the representations theretofore made, accepted the offer. On the 22d day of February, 1904, a deed was executed and delivered to defendant Rousseau, and the \$200 paid. Immediately thereafter the defendant Rousseau conveyed the land to the defendant Victoria Happell. As soon as the land was conveyed to the Happells, the plaintiffs discovered the fraud perpetrated upon them, and immediately tendered the \$200 to the Happells and demanded a reconveyance of the property. The demand was not complied with, and the plaintiffs brought this action to set aside the deeds, and paid the \$200 into court. The court below found the facts as above set forth, and entered a judgment cancelling the deeds on the ground of fraud. From that judgment the defendants appeal.

The first error assigned is that the appellant Rousseau was neither a necessary nor a proper party to the action. The relief asked was the cancellation of two deeds, in one of which this appellant was grantee, in the other grantor. He was therefore a proper party to the suit. Furthermore, he was in no manner affected by the decree, no costs were awarded against him, and he should not be heard to complain.

The second assignment relates to the admission of evidence tending to show the representations made by the stranger who first called on respondents. The particular objection is that such representations are not set forth or alleged in the complaint. While this is true, testimony as to these representations was simply explanatory of the representations made by the appellant Rousseau. In addition to this, the appellants in their proposed findings concede that the representations were made by Rousseau as alleged, and were false. The mere fact that they were also made by another could not affect the result.

The main contention of the appellants is that this case comes within the rule often announced by this court that, where the vendor and purchaser are dealing at arm's length, and where the subject-matter of the sale is at hand, the purchaser must protect himself and cannot rely upon representations made by the vendor. This rule is firmly established where the representations relate to the subject-matter of the sale which is at hand, or to other facts the truth of which may readily be ascertained by the exercise of ordinary care and prudence. But the converse of this rule is equally well established where the subject-matter of the sale is not at hand, so that the truth or falsity of the representations concerning it may be ascertained, or where the representations relate to facts within the knowledge of one of the parties, and the truth or falsity of such representations cannot be ascertained by the other party upon reasonable investigation or by the exercise of reasonable care and prudence. Such are the cases of *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643; *Mulholland v. Washington Match Co.*, 35 Wash. 315, 77 Pac. 497; *Stack v. Nolte*, 29 Wash. 188, 69 Pac. 753; and *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559. In the last case cited this court said:

"But these cases are not in point [referring to the cases relied on by appellants] in the case before us. Here the false representation was as to a material matter entirely

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without the knowledge of the respondents. As it was shown that the ground had been left to overgrow with brush and trees, and that the stakes of the original survey were destroyed, it was hardly possible for the respondents to locate the lots; hence they must of necessity rely on the representations of some one. Because they chose to rely on the representations of the appellants, the appellants cannot be heard to assert, as a means of escaping liability for making such representations, that the respondents should have gone to some one less reckless in their statements."

Considering the small amount involved in the sale in question, and the nature of the representations made, it cannot be said that the respondents were at fault in not discovering the fraud prior to the sale.

There is no error in the record and the judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 5701. Decided November 17, 1905.]

E. A. PHILLIPS, *Respondent*, v. R. O. WELTS, *as Treasurer of Skagit County, Appellant*.¹

COUNTIES—SALE OF PROPERTY—TERMS—MINUTES OF COUNTY BOARD. As the minutes of the proceedings of the board of county commissioners do not constitute the exclusive evidence of their official action, evidence of the members is competent to show that a sale of county property mentioned in the minutes was to be made subject to the approval of the board.

SAME—COUNTY COMMISSIONERS—POWERS—ORDERING SALE SUBJECT TO APPROVAL. The board of county commissioners, as the business managers of the county, have the power, in ordering sales of county property, to require that the sales shall be subject to their approval, under Laws 1903, p. 73, providing that they may fix the terms of sale.

¹Reported in 82 Pac. 737.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered December 14, 1904, in favor of the plaintiff, after a trial on the merits before the court without a jury, directing the county treasurer to execute and deliver a deed to property sold by the county for taxes. Reversed.

Million & Houser, for appellant.

Quinby & Wells, for respondent.

Root, J.—This is a mandamus proceeding instituted in the superior court by respondent to compel the appellant, as treasurer of Skagit county, to execute and deliver to him a deed to a certain lot in the city of Anacortes, to which he claims the right to a conveyance by reason of an alleged sale, made by such officer, of said lot at an auction of property theretofore acquired by the county, pursuant to tax foreclosure proceedings. The sale in question was made pursuant to the act of March 9, 1903. Laws 1903, p. 73. In the published notice of the sale, the following language appeared: "Notice is hereby further given that all sales are subject to the approval of the board of county commissioners." At the time and place of the sale, respondent was the highest and best bidder, and said lot was "knocked down" to him, and he was then and there given a memorandum by the appellant, county treasurer, which contained, among other things, the following: "Upon approval of sale by board of county commissioners, certificate of purchase will be issued."

Subsequent to the time of this sale, the board of county commissioners of said county refused to confirm the sale of said lot. Thereupon, this action was commenced. Respondent's contention in the lower court was, and here is, first, that the board of county commissioners did not order this property to be sold subject to its confirmation; and second, that said board had no authority in law to put such a restriction

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or condition upon the sale of said property. It appears that the learned trial court sustained the latter contention. A decree was entered by that court directing appellant to execute and deliver to respondent a deed of said premises. From this decree an appeal is taken to this court.

The parties entered into a stipulation as to all of the material facts, excepting as to the question as to whether or not the commissioners ordered the sale of said property to be made subject to their confirmation. Upon this question, evidence was adduced. The appellant, in speaking of the directions given him by the board of commissioners, among other things, testified: "They directed me to make these sales subject to confirmation by the board; that they would take the place of cruiser's estimates in our judgment." He was then asked this question, "Was this notice which you gave in pursuance of that direction from the board? A. Yes, sir." No effort was made to dispute this testimony, except by showing that the minutes of the board, as first written up by the clerk, did not say anything about the treasurer being required to sell the property subject to the confirmation of the board. A clause to this effect was, however, subsequently inserted in the minutes at the request of one or more of the board.

It was urged by respondent that these minutes could not be changed by any or all of the members acting individually, but that it could only be done by the commissioners acting in their capacity as a board. As to the making of this amendment to the minutes, we do not conceive it to be a material matter. The minutes of a board of commissioners do not constitute the exclusive evidence of its doings, nor of the instructions given to other officials whose actions the law authorizes it in certain cases to direct or control. Appellant having testified that the board directed him to advertise and sell this property subject to its confirmation, his testimony, if untrue, could readily have been shown so to be by producing the evidence of the members of the board.

We think that the record clearly shows that the treasurer was authorized and directed by the board to sell this property subject to its confirmation.

We also think that the board had the power to impose the condition and restriction in question. In the case of *State ex rel. Mackay v. Phillips*, 36 Wash. 651, 79 Pac. 313, this court held that the board of commissioners had a right, in selling property under this statute, to fix a minimum price below which the property should not be sold. In that case this court, speaking by Rudkin, J., said:

“Under the law of this state, Bal. Code, § 342, the board of county commissioners are intrusted with the care and management of the property and funds of the county. The act under which the order of sale in this case was made, Law of 1903, p. 73, provides that a sale may be ordered ‘when in the judgment of the board of county commissioners they deem it for the best interest of the county to sell the same;’ and that the treasurer shall give notice, stating the time and place and *terms* of sale. Under these statutes, we think that the board of county commissioners, in the interest of the public, have the power to fix a minimum price below which county property shall not be sold. Under any other view, the board, charged with the duty of managing, controlling, and selling county property, and conserving the public interest, would be compelled to stand idly by and see the property of the county sold at a sacrifice. We do not think that such was the intent of the law.”

In principle, we are unable to distinguish that case from this. The statute expressly provides that the commissioners may fix the “terms” upon which the sale shall be made. It is suggested that this refers to the financial terms; but this could hardly be true in the light of the statutory provision that the sale must be made for cash. It would seem to be a wise and businesslike limitation that sales of county property, under the provisions of the statute in question, should be made subject to the approval of the board of commissioners. This board is the business manager of the county’s affairs, and should be a conservator of the county’s interests.

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It is certainly a commendable requirement that sales of property should not be concluded without the investigation and approval of the board of county commissioners. We are satisfied that such a restriction is in accord with the terms and purposes of the statute.

The judgment of the honorable superior court is reversed, and the cause remanded for further proceedings.

MOUNT, C. J., CROW, DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 5650. Decided November 17, 1905.]

ED. S. KEENE, *Respondent*, v. WALLACE C. BEHAN *et al.*,
Appellants.¹

BILLS AND NOTES—ACTIONS—DEFENSES—USURY—BURDEN OF PROOF. In an action by the indorsee of promissory notes, shown to be usurious and void in the hands of the original payee, the burden of proof is upon the holder to show that he acquired the notes before maturity, for value and in good faith, without notice of the usury.

SAME—CONSIDERATION—TITLE OF PAYEE—WHEN DEFECTIVE. Under Laws 1899, p. 350, § 55, the title of a person who negotiates a promissory note is defective where the only consideration therefor was unlawful usury exacted on a former note between the same parties.

SAME—EVIDENCE OF GOOD FAITH—NECESSITY. Under Laws 1899, p. 350, § 52, the burden of proof is upon the holder of a usurious note, to show affirmatively the facts constituting good faith upon his part, and that he had no notice of the defect, and it is not sufficient for him to prove that he acquired the notes before maturity for value.

SAME—SUFFICIENCY. The claim that an indorsee acquired usurious notes before maturity, without notice of the usury, is not sustained where his testimony is uncorroborated, and it appears that he acquired the same at a heavy discount under suspicious circumstances, after one of the series was overdue, which he claimed not to have purchased, and after all had been declared due, that he demanded payment of all of them before his first one matured, that the former holder demanded payment after the date on which the indorsee claims to have bought them, and where he failed to state the circumstances under which he bought.

¹Reported in 82 Pac. 884.

Appeal from a judgment of the superior court for King county, Bell, J., entered January 7, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, foreclosing a chattel mortgage. Reversed.

Hastings & Stedman, for appellants.

Blaine, Tucker & Hyland, for respondent.

CROW, J.—Action to foreclose a chattel mortgage. From a judgment and decree in favor of respondent, this appeal has been taken.

On April 21, 1904, appellants, Wallace C. Behan and Mae Behan, his wife, executed and delivered to one R. O. Reed seven promissory notes, six for the sum of \$12.50 each, one falling due May 10, 1904, and one each month thereafter; and the seventh note for \$84.50, falling due November 10, 1904. All of said notes bore interest from date at the rate of one per cent per month, payable monthly, and contained a stipulation that, if said interest was not so paid, the whole sum of both principal and interest might be immediately declared due and payable, at the option of the holder. Appellants, on said April 21, 1904, also executed and delivered to said R. O. Reed, as security for said notes, the chattel mortgage now sought to be foreclosed; which provided that, in case of failure to pay any part of the principal or interest when due, the mortgagee might declare the whole debt immediately due and payable.

Respondent, Ed. S. Keene, alleged that on June 8, 1904, he purchased, for value and before maturity, all of said notes, except the one which had previously matured on May 10; that no payment of either principal or interest had been made on any one of said seven notes; and that those purchased by him had been indorsed without recourse by said R. O. Reed.

Appellants denied that respondent was a purchaser in good faith or for value or before maturity, and alleged that

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all of said notes were without lawful consideration; that said Reed and one R. W. Barto were partners, under the firm name of Barto & Reed, and that said notes, although payable to Reed, were held by said firm as a partnership asset; that on or about May 16, 1901, appellants borrowed \$200 from said Barto & Reed, at the rate of five per cent per month interest, and executed and delivered to said R. O. Reed, for said firm, their certain notes and chattel mortgage of that date, to the total amount of \$238, bearing interest at the rate of one per cent per month; that appellants paid \$176.20 thereon, prior to December 11, 1902, at which time said Barto & Reed required them to execute renewal notes for \$190, bearing interest at one per cent per month; that prior to April 1, 1904, appellants had paid the further sum of \$84.56 on this second series of notes, so that the entire payments made by them amounted to \$260.76, more than sufficient to pay said original loan and all interest thereon at the maximum rate allowed by law; that on or about April 1, 1904, said Barto & Reed pressed appellants for another series of renewal notes to evidence the usurious interest on said former loan; that appellants, being in financial distress and threatened with litigation, afterwards executed said chattel mortgage and notes of April 21, 1904, to the amount of \$159.50; that the only consideration therefor was the unlawful usury exacted by said Barto & Reed; and that respondent was not a *bona fide* purchaser for value, but knew that appellants had a complete defense. These affirmative defenses were denied. The trial judge made findings of fact and conclusions of law in favor of respondent, and refused those requested by appellants.

This is an action in equity, and is now before us for trial *de novo*. There is no dispute as to the usurious nature of the contracts between Barto & Reed and appellants, or that the rates of interest contracted and collected were in violation of § 7, chap. 130, Laws 1899, p. 128. All of the allegations made by appellants were sustained. In fact, no attempt was

made by respondent to controvert or rebut their evidence. He based his right to recover solely upon his claim that he became holder of six of said notes, in due course, for value and before maturity. We shall, therefore, consider this case on the theory that, as between Reed and appellants, said notes were fraudulent and void. Appellants contend that, as soon as they proved the notes were without consideration, the title of Reed was shown to be defective, and the burden of proof then fell upon respondent to show that he had acquired title as holder in due course; that, in doing so, he must not only show that he had acquired said notes before maturity and for value, but, also, that he took the same in good faith, and that, at the time the notes were negotiated to him, he had no notice of any infirmity therein, or defect in the title of Reed. This contention is sustained, not only by the decisions of numerous courts of last resort, but also by §§ 52, 55, 56, and 59 of our negotiable instruments law, chap. 149, Laws 1899, pp. 350, 351. See, also, Crawford's Ann. Negotiable Instruments Law (2d ed.), p. 59, note b; *Canajoharie Nat. Bank, v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; *Fawcett v. Powell*, 43 Neb. 437, 61 N. W. 586; *Skinner v. Raynor*, 95 Iowa 536, 64 N. W. 601; *Vosburg v. Diefendorf*, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. 836; *Knox v. Williams*, 24 Neb. 630, 39 N. W. 786, 8 Am. St. 220. The learned trial judge held against the contention of appellants as to the burden of proof, which probably accounts for the decree entered.

Section 55 of the act of 1899 provides:

"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

In view of the facts above stated, we think that, under this

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section, the title of the original payee Reed was defective when he negotiated the notes. Section 59 provides:

"[Every] holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

The title of Reed being defective, the burden was on respondent to show that he acquired title as holder in due course. Section 52, defining a holder in due course, reads:

"A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Respondent testified that he purchased the notes before maturity for value, but did not attempt to show any further facts. After appellants had shown the title of Reed to have been defective, the burden devolved upon respondent to show, (1) that he took the notes not only for value but, also, in good faith; in other words, he was required to affirmatively show facts constituting good faith upon his part; (2) that, at the time the notes were negotiated to him, he had no notice of any defect in the title of the person negotiating them. This he did not endeavor to do. Section 56 reads as follows:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts

that his action in taking the instrument amounted to bad faith."

If it appears from the evidence that respondent had knowledge of the defect in Reed's title, or knowledge of such facts that his action in taking the instruments amounted to bad faith, then he did not show that he was a holder in due course.

After a thorough examination of all the evidence, and carefully weighing the same, and being guided by the principles above announced, we find respondent was not a holder in due course. The evidence shows that, in the hands of Reed, or the firm of Barto & Reed, the notes were without a legal consideration, and were void. Respondent claims to have purchased six of said notes on June 8, 1904, paying \$125, not by check, but in cash. On June 9, he immediately notified appellants by letter that he had bought the notes, saying, "Kindly call and give them attention at once." Appellants alleged and proved that, prior to June 8, all seven notes had been declared due by Barto & Reed, and also alleged that respondent, having knowledge of this fact, had purchased all of said notes, including the one then by its terms past due. Respondent denies that he purchased the first note. If this is true, and if he did not know the notes had all been declared due, why did he in his letter of June 9 demand settlement of all the notes held by him, his first note not maturing until June 10? According to his own statement, he purchased his six notes, amounting to about \$150, for \$125 cash, none of them being due and all bearing a high rate of interest, and did this without seeking to learn why Barto & Reed were selling at such a heavy discount. He did not examine the records to ascertain whether he was obtaining a first mortgage lien. He did not know appellants nor their financial standing. He made no inquiry in regard to them, did not examine the mortgaged property, and yet permitted Reed to indorse the notes to him without recourse. He is a money lender, making loans on chattels; yet he

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negotiated for these notes in this manner. On June 10 he again demanded full payment of all his notes, although, according to his own theory, he would then be entitled to collect one only, no others being due. He took no formal assignment of the mortgage, but at the trial produced an unacknowledged copy, now a part of the statement of facts.

A short time prior to the commencement of this action, one of the attorneys for appellants called upon him, and asked to see the notes purchased by him. He showed one, but refused to show any others. He was asked, when giving his evidence, whether the note so shown to the attorney was not the one that matured on May 10, and denied that it was, without stating which one was shown. He alleged in his complaint, and evidently knew, that the note which matured on May 10 was unpaid. This note was secured by the chattel mortgage and, being still held by Reed, made Reed a necessary party to this action, he being entitled to a lien on the property to secure its payment. Respondent did not make him a party, nor did he attempt to litigate his rights. Respondent knew the notes provided for monthly payments of interest, which had not been made; that Reed, at his option, could have declared all the notes due for such nonpayment. He also knew that the principal of the first note had not been paid; yet he fails to show any effort on his part to ascertain whether Reed had previously exercised his option of declaring them all to be due.

The evidence of appellant Wallace C. Behan shows that on June 9, the day after respondent claims to have purchased his notes, said Wallace C. Behan was making a payment of \$110 to Barto & Reed to redeem some jewelry, on a transaction not pertaining to these notes, and that Barto then requested him to pay \$55 of said sum on these very notes, instead of redeeming all of the jewelry. Yet respondent claims he had purchased and obtained possession of his notes on the preceding day. Barto was a witness for respondent, but made no attempt to contradict this testimony, or to

give his version of the sale of the notes made by him to respondent, nor was he asked to do so.

In *Fawcett v. Powell*, *supra*, the supreme court of Nebraska says:

"The defense of fraud in the inception of the notes held by Mr. Fawcett was established without question—indeed the perpetrators of the fraud for some reason failed to testify. The rule which governs the right of a holder of a note under these circumstances is thus stated in *Violet v. Rose*, 39 Neb. 660: 'It seems that in an action by an endorsee of a promissory note against the maker where the defendant pleads fraud in the inception of the note, the burden is upon the plaintiff to show that he is a *bona fide* holder for value.'"

Respondent is an interested party; hence, in weighing the testimony, we are not compelled to accept his statements, if they do not bear the stamp of credibility, even though uncontradicted. *Canajoharie Nat. Bank v. Diefendorf*, *supra*. In *Elwood v. Western Union Telegraph Co.*, 45 N. Y. 549, 6 Am. Rep. 140, we find this language, which is quoted with approval by this court in *Coey v. Darknell*, 25 Wash. 518, 65 Pac. 760:

"It is undoubtedly the general rule that where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption. . . . But this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. The general rules laid down in the books at a time when interest absolutely disqualified a witness, necessarily assumed that the witnesses were disinterested. That qualification must, in the present state of the law, be added. And furthermore, it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases, courts and juries are not bound to refrain from exercising their

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judgment and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached."

It is true that respondent said he purchased the notes for value before maturity, but he utterly fails to state any facts showing the circumstances under which he purchased the same. The entire record shows a studied effort upon his part to avoid obtaining information. In view of all the circumstances, and the undisputed transactions and dealings between the parties, we are compelled to reject, as unworthy of credit, the bare and unsupported statement of respondent that he purchased before maturity, for value, and without notice; and to hold that he has utterly failed to maintain the burden of proof resting upon him to show that he was a holder in due course.

The judgment of the superior court is reversed, and the cause remanded, with instructions to enter judgment in favor of appellants.

MOUNT, C. J., ROOT, DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 5846. Decided November 22, 1905.]

F. P. EGAN, *Respondent*, v. MERCHANTS FIRE ASSOCIATION,
Appellant.¹

INSURANCE—PROOFS OF LOSS—CERTIFICATE OF MAGISTRATE NO PART—ACCRUAL OF ACTION. Under a fire insurance policy providing that suit shall not be commenced until sixty days after the proofs of loss are furnished, and that a certificate of a magistrate that the loss was honestly sustained shall be furnished "if required," the certificate is no part of the proofs of loss, and suit commenced sixty days after furnishing proofs is not premature, although less than sixty days had elapsed since the furnishing of the certificate; and the company could not by demanding the certificate, delay the bringing of the action.

¹Reported in 82 Pac. 898.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 18, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a fire insurance policy. Affirmed.

Blaine, Tucker & Hyland (Frank T. Reid, of counsel), for appellant.

Ballinger, Ronald, Battle & Tennant and F. E. Brightman, for respondent.

HADLEY, J.—This is an action to recover for loss by fire. Prior to the fire, the defendant had issued its policy of insurance upon a stock of merchandise and fixtures, and also upon household goods. The plaintiff, by assignment, is the owner of the interest of the assured. The cause was tried by the court without a jury, and resulted in a judgment for the plaintiff. The defendant has appealed.

The only question urged upon the appeal is that the action was prematurely brought. The policy provides that the loss shall be payable sixty days after satisfactory proofs have been received and the loss ascertained by the assured and by the association. The property insured was destroyed by fire on February 20, 1904, and the insured at once notified the company. Within a week after the receipt of such notice, the company's adjuster called upon the insured, and on March 8, the latter made an affidavit setting forth the fact that the loss had occurred, but not stating the extent thereof. The purpose of the affidavit seems to have been to admit that the adjuster was present to hold a preliminary examination into the facts and circumstances, and to agree that the insured would, when requested, submit to further examination regarding his property, his financial condition, and the origin of the fire. Soon afterwards, the adjuster again visited the insured, examined him on the subjects above mentioned, and prepared two affidavits, which the insured signed on March

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18. These relate to the source from which the assured obtained the money which was invested in his business, and the amount invested; but they enter into no particulars relating to the fire.

Thereafter, on April 1, the insured presented to the appellant, in writing, what was upon its face designated as "proof of loss." This writing was prepared upon a blank form furnished by the appellant, and it entered into details as to the loss. Attached to it was an invoice list of goods, with the value of each item which the insured claimed was lost by the fire. There was also attached a list of property claimed to have been saved from the fire, and also a statement showing the total insurance on the property, in what companies the same was insured, and the amounts of each.

The writing was verified by the oath of the insured. On April 4 the appellant, by letter, acknowledged receipt of this writing, and designated it "purported proofs of loss," saying that it had been referred to appellant's adjuster, J. H. McKowen, at Spokane, who had entire charge and authority in the matter, and to whom all communications should be addressed. Thereafter, on April 25, said McKowen, acting as adjuster, by letter requested the insured to furnish the company the following:

"A certificate of a magistrate or notary public, not interested in the claim as a creditor or otherwise, or related to you, living nearest the place of the fire; stating that he has examined the circumstances, and believes that you have honestly sustained loss, to the amount sworn to in your statement made on the 18th of March, 1904, I will present your claim to the company for consideration."

On May 7 the insured, in compliance with said request, forwarded such certificate. The action was commenced June 24.

It will be seen that the action was commenced less than sixty days after the certificate was furnished, but more than sixty days after the writing called "proof of loss" was fur-

nished to appellant. Appellant contends that the certificate was a necessary part of the proof of loss. Under the terms of the policy, we do not think it was. The policy provides absolutely that the assured shall furnish certain specified information concerning the loss. The certificate of the magistrate or notary is to be furnished only "if required." The assured gave full information concerning the loss strictly as provided by the policy. He could not know that the magistrate's certificate would be "required," as that was a matter that depended entirely upon the will of the insurer. The insured was under no obligation to furnish it, unless it was demanded. But he was obligated to furnish the proof of loss. The certificate contained no additional information as to the fact of the loss, but simply amounted to a statement of facts from a disinterested person, which appellant could require or not at its pleasure. Appellant had the right to demand the certificate, and it having been demanded before the action was commenced, the furnishing of it then became a condition precedent to the right to sue. But the mere fact that it was furnished did not make it a part of the proof of loss. The same contention appellant makes here was made in *Merchants' Ins. Co. v. Gibbs*, 56 N. J. L. 679, 29 Atl. 485, 44 Am. St. 413. The court held against it, and said:

"The demand for notary's certificate was not a demand for amended proofs of loss. Such a certificate is no part of the proofs of loss, and it need not be furnished with or annexed to the proofs of loss. It is outside of the proofs of loss, and is required by the terms of the policy only on express demand by the company for it."

The statement of the facts hereinbefore set out shows that the assured was diligent in bringing to the attention of the appellant the facts concerning the loss. The adjuster made two trips to see the assured, and required him to sign affidavits which appellant demanded. He subjected him to a detailed examination as the basis of the affidavits, but care-

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fully avoided including therein the statement of such facts as are ordinarily made in support of proof of loss. The assured, however, protected his own rights and, following the adjuster's last departure, he prepared and forwarded to the appellant the formal proof of loss strictly as required of him by the policy. Appellant was thus fully informed of the loss by the necessary written proofs more than sixty days before this suit was commenced, and it cannot extend the time of its due day merely by demanding and receiving a magistrate's or notary's certificate which is no part of the proof of loss.

The action was not prematurely brought, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 5766. Decided November 22, 1905.]

THE STATE OF WASHINGTON *et al.*, Respondents,
v. G. B. NICOLL *et al.*, Appellants.¹

INJUNCTIONS—JURISDICTION—TO ENJOIN ELECTION ON ANNEXATION OF TERRITORY TO CITY—APPEAL—DECISION—LAW OF CASE. Where it has been determined on appeal that the superior court had jurisdiction of a proceeding to enjoin a city election, the question is concluded and cannot be again urged upon a proceeding for a contempt in the violation of an order issued therein.

SAME—COMMENCEMENT OF ACTION—SUMMONS—JURISDICTION ACQUIRED UPON FILING COMPLAINT. As an action may, under Bal. Code, § 4869, be commenced by the filing of the complaint, to be followed by service of summons within sixty days, the court acquires jurisdiction to grant a temporary restraining order upon the filing of the complaint, and before service of a summons.

MUNICIPAL CORPORATIONS—OFFICERS—ENJOINED FROM HOLDING SPECIAL ELECTION—ELECTION ALREADY CALLED. Where a restraining order has been served upon the city officers, enjoining the holding of

¹Reported in 82 Pac. 895.

an election, it is their duty to stop the election, and they cannot avoid punishment for contempt by showing that the election had already been called and the election officers appointed.

SAME—COURTS—JURISDICTION — GRANTING INJUNCTION WITHOUT NOTICE ON THE DAY BEFORE ELECTION—PROPRIETY—DISCRETION. While the propriety of enjoining a municipal election upon the eve of the election, without giving notice of the application, is questionable, the matter is within the discretion of the trial court, and objection thereto does not go to the jurisdiction of the court to make the order.

CONTEMPT—VIOLATION OF ORDER—PARTIES—JOINDER—SUFFICIENCY OF AFFIDAVIT. Where an affidavit in contempt proceedings against the mayor and council of a city alleges the violation by such officers of an order of court, after advising with the city attorney and upon the hearing the city attorney admits that he advised the violation of the order, the court has jurisdiction to order the city attorney made a party defendant, and to proceed against him as an original party to the proceedings without the filing of a new affidavit, although the statute provides that contempts not committed in the presence of the court can be prosecuted only upon affidavit stating the facts (CROW and FULLERTON, JJ., dissenting).

APPEAL—REVIEW—JUDGMENT OF CONTEMPT—DISCRETION. Contempt proceedings are summary, and so far as questions of law are concerned, the extent of the hearing is within the discretion of the court, which will not be reviewed when the conclusion arrived at is correct.

Appeal from a judgment of the superior court for King county, Yakey, J., entered April 28, 1905, upon a hearing before the court adjudging the defendants guilty of contempt of court. Affirmed.

Herbert N. DeWolfe, for appellants. A court of equity cannot, at the instance of a private citizen and taxpayer, sit in review of a proceeding by a city council to annex territory to the municipality. *Moore v. Smedley*, 6 Johns. Ch. 28; *Lane v. Morrill*, 51 N. H. 422; *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757; *Shank v. Ravenswood*, 43 W. Va. 242, 27 S. E. 223; *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 42 Am. St. 220, 25 L. R. A. 143; *New York Life Ins. Co. v. Supervisors*, 4 Duer 198; *Van Rensselaer v. Kidd*, 4 Barb. 17; *Hyatt v. Bates*, 40 N. Y. 164; *Tucker v. Freeholders*, 1 N. J. Eq. 282; *Camden v. Mulford*, 26 N. J. L. 49; 2 High,

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Citations of Counsel.

Injunctions (3d ed.), §§ 1249, 1250; *McDonald v. Rehner*, 22 Fla. 198; *Henry v. Steele*, 28 Ark. 455. The determination of the city council was final and binding on the courts, it having exclusive jurisdiction of the subject-matter under the statute. *Kuhn v. Port Townsend*, 12 Wash. 605, 41 Pac. 923, 50 Am. St. 911, 29 L. R. A. 445; *Ryan v. Varga etc. R. Co.*, 37 Iowa 78; *Delphi v. Startzman*, 104 Ind. 343, 3 N. E. 937; *In re Susquehanna Tp.*, 17 Pa. Co. Ct. 398; *Heffner v. County Com'rs*, 16 Wash. 273, 47 Pac. 420; *Ellis v. Karl*, 7 Neb. 381; *Mullikin v. Bloomington*, 72 Ind. 161; *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354. A court of equity cannot contest a municipal election, or restrain an election or the canvass of the votes cast thereat. Const., art. 1, § 19; *State ex rel. Ellingsworth v. Carlson* (Neb.), 101 N. W. 1004; *Richards v. Klickitat County*, 13 Wash. 509, 43 Pac. 647; *Walton v. Develing*, 61 Ill. 201; *Smith v. McCarthy*, 56 Pa. St. 359; *Dickey v. Reed*, 78 Ill. 261; *People ex rel. Fitnam v. Galesburg*, 48 Ill. 485; *Green v. Mills*, 69 Fed. 852. A court of equity cannot restrain an election for irregularities when it is not alleged that any different result would be attained if the notice required by statute had been given. *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077; *Williams v. Shoudy*, 12 Wash. 362, 41 Pac. 169; *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. 39; *Hesseltine v. Wilbur*, 29 Wash. 407, 69 Pac. 1094; *Baltes v. Farmers' Irr. Dist.*, 60 Neb. 310, 83 N. W. 83. A court of equity cannot decree what territory shall not be included within the limits of a municipality. *Forsyth v. Hammond*, 71 Fed. 443; *In re Village of Ridgefield Park*, 54 N. J. L. 288, 23 Atl. 674; *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106; *Henry v. Steele*, 28 Ark. 455; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658; *Glaspell v. Jamestown*, 11 N. D. 86, 88 N. W. 1023; *Galesburg v. Hawkinson*, 75 Ill. 152. A court of equity cannot restrain the annexation of territory to a municipal corporation upon the ground of un-

equal taxation. *Frace v. Tacoma*, 16 Wash. 69, 47 Pac. 219; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658; *Ferguson v. Snohomish*, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795. The annexation of territory to a municipal corporation is a political proceeding which in no manner affects property rights. *Stilz v. Indianapolis*, 55 Ind. 575; *State ex rel. Schroeder v. Superior Court*, 29 Wash. 1, 69 Pac. 366; *Selde v. Lincoln County*, 25 Wash. 198, 65 Pac. 192; *Sheridan v. Colvin*, 78 Ill. 237; *Taylor v. Kercheral*, 82 Fed. 497; *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581. The mere allegation of fraud, the court having no jurisdiction of the subject-matter of the action, does not bring the case within the jurisdiction of a court of equity. *Cade v. Head Camp*, 27 Wash. 218, 67 Pac. 603; *Butte Hardware Co. v. Knox*, 28 Mont. 111, 72 Pac. 301; *Hartt v. Harvey*, 32 Barb. 55; *Cox v. Dawson*, 2 Wash. 381, 26 Pac. 973; *West Coast Grocery Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35; *Wingard v. Jameson*, 2 Wash. Ter. 402, 7 Pac. 863. Equity has no jurisdiction to protect purely political rights. *State v. Stanton*, 6 Wall. 50, 18 L. Ed. 721; *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; *Peck v. Weddell*, 17 Ohio St. 283; *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 868, 25 Am. St. 840, 5 L. R. A. 334; *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 42 Am. St. 220 and note p. 234, 25 L. R. A. 143; *Kerr, Injunction*, §§ 1-3; *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402. The acts of the city officials in annexing the territory contrary to the mandate of the court did not amount to a contempt, the court having no jurisdiction of the subject-matter of the action or to issue the restraining order. *State ex rel. News Pub. Co. v. Milligan*, 4 Wash. 29, 29 Pac. 763; 2 High, Injunction, § 1454; *State ex rel. Victor Broom Co. v. Peterson*, 29 Wash. 571, 70 Pac. 71; *State ex rel. Evans v. Winder*, 14 Wash. 114, 44 Pac. 125; *Savage v. Sternberg*, 19 Wash. 679, 54 Pac. 611, 67 Am. St. 751; *Smith v. McCarthy*, 56 Pa. St. 359.

McCafferty & Bell, for respondents.

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RUDKIN, J.—On the 21st day of April, 1905, the estate of Amos Brown, incorporated, filed its complaint in the court below, praying for an injunction enjoining and restraining the defendants, the City of West Seattle, its mayor, and city council, from holding a special election on the 22d day of April, 1905, for the purpose of determining whether certain territory should be annexed to said city. On the same day the court made an order, without notice, reciting that an emergency existed therefor, enjoining and restraining the said city, its mayor, and city council, from holding said election or from taking any action or proceeding whatever looking to the annexation of the territory sought to be annexed, until the further order of the court, and citing the defendants to appear and show cause on the 28th day of April, 1905, at the hour of 9:30, a. m., why a temporary injunction should not be granted as prayed. An injunction bond in the sum of \$1,000 was filed with, and approved by, the clerk of the court, and certified copies of the restraining order were thereupon served upon the defendant city, its mayor, and councilmen, all of whom were made parties to the action.

On the 24th day of April, 1905, the secretary and general manager of the plaintiff corporation filed an affidavit in the cause in which the restraining order issued, reciting the granting of the order, the filing of the bond, and the service of the order on the defendants, and averring that notwithstanding the order and the service thereof the defendants held said election on the 22d day of April, 1905, after consultation with the city attorney for said city, and with full knowledge that such action was in direct violation of said order. Upon the filing of this affidavit, the court ordered the issuance of a bench warrant for the defendants, commanding the sheriff to apprehend them, and have them present before the court on the 25th day of April, 1905. A bench warrant issued as directed, and the defendants named therein were arrested and brought before the court

to show cause why they should not be punished as for a contempt.

The defendants appeared and moved the court to dissolve the restraining order, and to quash the warrant of arrest, on various grounds, but the motions were denied. At no time during the proceedings was the violation of the restraining order denied or challenged. On the contrary, the city attorney, who appeared for the defendants, admitted in open court the violation of the order, and that such violation was under his advice. The court thereupon, on motion of the plaintiff in the action in which the injunction was granted, joined the city attorney as a party to the contempt proceeding, adjudged each and all of them guilty of contempt, and fined the mayor and councilmen one dollar each, and the city attorney one hundred dollars. From this judgment, the defendants have appealed.

The principal contention of the appellants is that the court below was without jurisdiction to grant the injunction out of which the contempt arose. This question was decided adversely to the appellants, in *State ex rel. West Seattle v. Superior Court*, 36 Wash. 566, 79 Pac. 29; and again, on the application of the City of West Seattle *et al.*, for a writ of prohibition in the cause in which the injunction in question was granted. The question of jurisdiction is therefore no longer an open one in this court. The only additional reason assigned why the court had no jurisdiction was that no summons was served on the appellants, and an affidavit to that effect was filed at the hearing. Under Bal. Code, § 4869, a civil action is commenced by the service of a summons, or by the filing of a complaint, provided one or more of the defendants are personally served, or service by publication is commenced within ninety days thereafter. The court therefore acquired jurisdiction to grant the restraining order upon the filing of the complaint with the clerk of the court.

It is further contended that the election had been called

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and officers appointed to conduct the same before the restraining order was granted, and that the mayor and city council had no further concern with the election except to canvass the returns. A city can only act through its officers. The mayor and city council called the election, and appointed officers to conduct the same, they had ample authority to stop the election, and it was their manifest duty to do so in obedience to an order of a court of competent jurisdiction. Complaint is also made that it was an abuse of discretion to grant the restraining order without notice on the eve of the election. The propriety of enjoining the holding of an election without notice is questionable, to say the least, especially where the parties affected thereby have ample notice of the election and an opportunity to give notice of the application for the restraining order, but the question of propriety is addressed to the discretion of the court and does not go to its jurisdiction.

It is next assigned as error on behalf of the city attorney that the court erred in joining him as a party with the other appellants in the pending proceedings for contempt. True, the statute provides that a contempt committed without the presence of the court can only be prosecuted by affidavit, setting forth the facts constituting the alleged contempt, and this court has held that the affidavit in such cases is jurisdictional. But in this case there was already an affidavit on file charging a violation of the order, after consultation with the city attorney, and the appellant now complaining admitted such violation in open court, and admitted that the order was violated under his advice. The chief office of the affidavit is to bring the facts constituting the alleged contempt to the attention of the court, and make the same a matter of record. When the contempt was admitted in the presence of the court, and was sufficiently set forth in an affidavit already on file against other parties, we do not think that the court exceeded its jurisdiction, or otherwise erred, in making the attorney a party to the proceedings.

The next and last assignment is that the court acted arbitrarily, and gave the appellants no opportunity to be heard. A party charged with contempt has the same right to be heard in his defense as a party charged with any other offense where life, liberty, or property is involved. Contempt proceedings, however, are summary in their nature, and the extent of the hearing, so far as it relates to questions of law alone, rests within the sound discretion of the court. The sole defense relied on by the appellants was a lack of jurisdiction in the court to grant the order which they had confessedly violated. The court decided that question correctly, and in accordance with a prior decision of this court. The question whether it arrived at its conclusion summarily or arbitrarily, or after the most painstaking investigation, is not subject to review here. Finding no error in the record the judgment is affirmed.

MOUNT, C. J., DUNBAR, and HADLEY, JJ., concur.

CROW, J. (dissenting) — I dissent from the majority opinion in so far as it affirms the judgment of the trial court finding the attorney, Herbert N. DeWolfe, guilty of contempt and imposing upon him a fine of \$100, for the reason that I do not think said court had any jurisdiction to make such an order. I take it as conceded that any contempt that may have been committed by said attorney was not committed in the immediate view and presence of the court, as contemplated by Bal. Code, § 5800. This being true, the only method of procedure for the court to adopt, as against said DeWolfe, was that provided by Bal. Code, § 5801, which reads as follows:

“In cases other than those mentioned in the preceding section, before any proceedings can be taken therein, the facts constituting the contempt must be shown by an affidavit presented to the court or judicial officer, and thereupon such court or officer may either make an order upon the person charged to show cause why he should not be arrested to

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answer, or issue a warrant of arrest to bring such person to answer in the first instance."

There has been no attempt to proceed under said section. The only affidavit filed was made by one A. L. Brown, and contained charges of contempt directed only against defendants other than said attorney. In fact, the attorney's name was not even mentioned. The only possible reference to him was in the following language:

"That this affiant is informed and believes said defendants violated said restraining order after consultation with the city attorney of said city and with full knowledge that their action was in direct violation of the order of this court."

This language is just as susceptible of an interpretation that said defendants violated said order after being fully and correctly advised by said city attorney as to their obligations and duties to the court under said restraining order, as an interpretation that he knowingly advised them to wrongfully and wilfully violate the same. It is impossible to deduce from said language any intelligent or accurate idea as to the character of the advice actually given. With the utmost respect for the learned and honorable member of this court who wrote the majority opinion, I feel constrained to suggest that this language scarcely justifies his conclusion stated in these words:

"When the contempt was admitted in the presence of the court and was sufficiently set forth in an affidavit already on file against other parties, we do not think the court exceeded its jurisdiction or otherwise erred in making the attorney a party to the proceedings."

The only showing in the record as to any admissions made by the attorney appears from the following extract, taken from an order appearing in the court journal:

"The plaintiff's motion to enjoin Attorney DeWolfe as respondent to the cause is granted. The court after finding defendant in contempt, imposes fine of \$1 upon each of the defendants, except Attorney DeWolfe, exception is allowed.

Attorney De Wolfe in open court states that upon his advice defendants violated restraining order, and he is fined \$100."

The record before us contains a statement of facts duly certified, but it makes no reference to any such statement as being made by Attorney DeWolfe, in response to any charge preferred against him, or otherwise. The only inference that can be drawn from the entire record is that this statement, if made, was so made by the attorney when the other defendants were adjudged guilty, for the purpose of showing mitigating circumstances in their behalf. I do not wish to be understood as even intimating that, if said DeWolfe, without the presence of the court, advised his clients to violate said restraining order, he was not guilty of contempt; but do express the opinion that the question of his guilt was not before the court, for the reason that it did not have jurisdiction under any affidavit to proceed against him. The question now before this court is, not whether he was or was not guilty of contempt, but whether the trial court has ever obtained jurisdiction to proceed against him for an alleged contempt committed without its immediate view and presence. He has at all times objected to the jurisdiction of the court, and as to him this objection should have been sustained. In *In Re Coulter*, 25 Wash. 526, 65 Pac. 759, this court, after referring to said §§ 5800 and 5801, says:

" . . . 'before any proceedings can be taken therein, the facts constituting the contempt must be shown by an affidavit presented to the court . . . ' While the power to punish for contempt is inherent in all courts, as such power is essential to the preservation of order, the due enforcement of the judgments, orders, and processes of the court, and, consequently, to the due administration of justice, it is, nevertheless, in its nature, arbitrary, capable of abuse, and, when exercised, affects either the property or the personal liberty of the individual against whom it is directed. And while the legislature may not lawfully take away this power altogether, it can, undoubtedly, to prevent its abuse,

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and to preserve the just rights of the individual, reasonably limit its exercise; When, therefore, the lower court proceeded to punish the petitioner without following the prescribed procedure, it proceeded illegally, and without authority of law. It is no answer to say that the facts were brought before the court by the return of the officer. If the court may derive knowledge of the violation of its order from this source, it may, from any other source, even the oral statement of a stranger to the proceedings. More than this, the statute is imperative. It has made an affidavit essential to set the powers of the court in motion, and, although the rights of the parties may be as well protected in a procedure had upon the return of the officer as in a procedure had upon an affidavit, yet the courts may not alter the statute."

In *State ex rel. Martin v. Pendergast*, 39 Wash. 132, 81 Pac. 324, this court says:

"The appellant contends that he was adjudged guilty of contempt for counseling and advising a violation of the order of the court of May 17th, above referred to, and that the judgment against him is erroneous for several reasons: First, because no such contempt is shown by the record; second, because the order of May 17th was a nullity, and no contempt could arise from a violation thereof; and, third, because such contempt, if any, could only be prosecuted by affidavit. Passing over the first reason assigned, the second and third are no doubt well grounded. The order of May 17th was not made in any pending action or proceeding. There was no pleading, no process, and no pretense of jurisdiction to make the order. Again, if counseling a violation of such order were a contempt at all, it was a contempt committed without the presence of the court and could only be prosecuted by affidavit."

See, also, *State v. Canutt*, 26 Wash. 68, 66 Pac. 130.

In my opinion the judgment of the superior court as to the defendant DeWolfe should be reversed, for the reason that it was entered without jurisdiction of said defendant and was, as to him, absolutely void.

FULLERTON, J., concurs with CROW, J.

[No. 5771. Decided November 22, 1905.]

FIRST NATIONAL BANK OF SEATTLE, *Respondent*, v. SAMUEL COLES, *Defendant*, J. B. MORFORD *et al.*, *Appellants*.¹

APPEAL—DISMISSAL—DEFECTIVE BOND. An appeal will not be dismissed for defects in the appeal bond in that the names of two of the sureties had been erased, presumably after signature by the other surety, where the objection was not raised below, and where the other surety is estopped to question the bond by the filing of a certificate that it signed the bond as sole surety.

APPEAL—FINDINGS—SUFFICIENCY—STATEMENT OF FACTS—REVIEW. No exceptions to findings of fact or conclusions of law are necessary where the sole question on appeal is whether the findings support the judgment.

FRAUDULENT CONVEYANCES—SALE OF OYSTER BUSINESS—KNOWLEDGE OF CREDITOR—LACHES—ESTOPPEL. Where after notice of the transfer of his debtor's stock of goods in bulk, fraudulent as to creditors for want of the statutory notice, a creditor makes no demand on the purchasers and waits for a year before attempting to reach the proceeds of the sale by garnishment, the debtor meanwhile becoming execution proof, the creditor is estopped to question the validity of the sale.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 15, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in a garnishment proceeding. Reversed.

Hastings & Stedman and *Troy & Falknor*, for appellants.
J. W. Rayburn and *William H. Brinker*, for respondent.

DUNBAR, J.—From November 30, 1902, to January 5, 1903, the defendant Samuel Coles was engaged in carrying on the business of buying and selling oysters, crabs, and fish, under the name and style of the "Waldrip Oyster Company," and had in his possession certain property, viz., one horse, one wagon, two sets of harness, one desk, chairs, and other

¹Reported in 82 Pac. 892.

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office furniture, which was used in carrying on the business. Prior to October 1, 1903, the plaintiff sued the defendant upon a promissory note, and on that day obtained judgment. On February 26, 1904, it sued out an execution upon this judgment, which was returned unsatisfied. On January 5, 1903, the garnishees Morford and Waldrip, appellants in this action, purchased from Coles the entire business of the Waldrip Oyster Company, including the good will of the business, together with all stock on hand, without taking from Coles, or demanding or receiving from him, a written statement, sworn to, giving the names and addresses of the creditors of Samuel Coles, or the amount of the indebtedness; and did not see to it that the purchase price paid by them to the said Samuel Coles was devoted to his creditors. After a fruitless attempt to recover on the judgment obtained against Coles, the plaintiff sought to subject defendant Coles' property, in the hands of the garnishees, to the payment of his debts, by proceeding against him by process of garnishment, and judgment was obtained against the garnishees in the sum of \$784. From this judgment this appeal is taken.

The respondent moves to dismiss this appeal, for the reason that the bond is defective, in that it appears upon the face of the bond that the names of M. C. Simmons and John A. Campbell had been erased from the same by drawing two lines across each name, and it is contended that the presumption would be that the names were erased after the signature of the other surety, which was the Title Guaranty & Trust company of Scranton, Pennsylvania. This is a question which ought to have been raised in the court below, as it has reference to the sufficiency of the sureties; but, in addition to this, the surety, the Title Guaranty & Trust Company, would be estopped from raising this point in any event, for it has filed in this court a certificate to the effect that the erasures of the names of Simmons and Campbell were made with its knowledge, and before it became surety on the bond,

and that it executed the bond with the understanding and belief and knowledge that it was the sole and only surety thereupon.

It is also alleged that no exceptions were taken, saved, or filed to the findings of fact or conclusions of law made by the superior court or to the judgment therein, and that no statement of facts or bill of exceptions has been made, certified, or filed therein; and a lengthy argument is made in appellants' brief on this proposition. But this court has uniformly decided that, where the sole question to be determined in the case was whether or not the conclusions of law properly followed the facts as found by the court, no exceptions were necessary; and this is the only contention that is made by the appellants here, that the findings of fact do not justify the conclusions of law:

The court found, among other things, that in the summer of 1902 said Samuel Coles, for the purpose of building a gasoline launch, applied to the respondent for a loan of \$1,000, telling the respondent the purpose for which the money was to be used, and obtained a loan of said \$1,000, giving a series of notes, in the aggregate amounting to \$1,000, to the respondent, signing said notes "The Waldrip Oyster Company, by Samuel Coles;" that said notes ran for ninety days and were renewed in the month of November, 1902, for ninety days additional, and in February, 1903, they were renewed again; at which time said Coles stated to respondent that he had sold his oyster business, and therefore could not renew the notes in the name of the Waldrip Oyster Company, and requested the respondent to take his individual notes in lieu of the Waldrip Oyster Company's notes, and the respondent stamped said Waldrip Oyster Company notes as paid and took notes in lieu thereof, signed by Samuel Coles, without any reference in said notes to the Waldrip Oyster Company; that said gasoline launch was retained by the said Samuel Coles, and not delivered to said Morford or Waldrip, or either of them. It is contended by

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the appellants, and justly so, we think, that this action on the part of the respondent bank operated as an estoppel on its part. It allowed the notes to run for a year after the sale, with full knowledge of the sale, making no demand upon the garnishee defendants, thereby lulling them into a feeling of security in relation to their transaction with Coles; and it should not be allowed to wait that length of time and then attempt to hold these appellants liable, after Coles had become execution proof, as shown by the return on the execution which it had issued.

Our view on this proposition renders unnecessary the discussion of whether the property that Coles sold to the appellants was such property as was contemplated by the act of March 16, 1901, in relation to sales-in-bulk. The judgment will be reversed, and the action dismissed as to the appellants.

MOUNT, C. J., HADLEY, FULLERTON, RUDKIN, CROW, and ROOT, JJ., concur.

[No. 5861. Decided November 22, 1905.]

F. O. HORRELL, *Respondent*, v. THE CALIFORNIA, OREGON
& WASHINGTON HOMEBUILDERS' ASSOCIATION,
Appellant.¹

APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY—EQUITABLE ACTION. The supreme court has jurisdiction of an appeal from a judgment in an equitable action to cancel fraudulent certificates of a building and loan association, and to recover the money paid thereon, regardless of the amount in controversy.

SAME—BONDS—SUPERSEDEAS—DECREE ANNULING CONTRACTS AND AWARDED MONEY JUDGMENT. Upon appeal from a judgment in an equitable case cancelling certain certificates and awarding a personal judgment for \$82.50, an appeal bond in double the money judgment and \$200 additional is sufficient, although the trial court assumed to fix the supersedeas on appeal in the sum of \$750; since the money judgment is the only part of the judgment that can be stayed, the other part being self-executing.

¹Reported in 82 Pac. 889.

SAME—NOTICE—SUFFICIENCY. A notice of appeal sufficiently describes the judgment as the final judgment in the cause without referring to its date, where it was the only judgment in the cause to which the notice could apply.

SAME—REVIEW—EXCEPTIONS—SUFFICIENCY—STRIKING STATEMENT. One general exception to the findings of fact is insufficient to authorize a review of the testimony, and is ground for striking the statement of facts.

CORPORATIONS—FOREIGN BUILDING AND LOAN ASSOCIATION—FAILURE TO COMPLY WITH STATUTE—EFFECT ON CONTRACTS. Contracts made by a foreign building and loan association without complying with certain statutory requirements whereby it is authorized to transact business in this state, are not void, where the law prescribes a penalty for so doing without declaring that the contracts made shall be void.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 4, 1905, upon findings in favor of the plaintiff after a trial on the merits before the court without a jury, in an action to cancel contracts of a foreign building and loan association, and recover payments made thereon. Reversed.

F. R. Burch and *Harold Preston*, for appellant, contended, *inter alia*, that contracts made by a foreign corporation without complying with the laws of the state are not void unless expressly declared to be so. *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327; *La France Fire Engine Co. v. Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. 827; *Vermont Loan etc. Co. v. Hoffman*, 5 Idaho 376, 49 Pac. 314, 95 Am. St. 186, 37 L. R. A. 509; *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 88; *Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 67; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Clark v. Columbus Ins. Co.*, 19 Mo. 54; *American etc. Loan Ass'n v. Rainbolt*, 48 Neb. 434, 67 N. W. 493; *Garratt Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187, 37 Atl. 948, 78 Am. St. 852, 38 L. R. A. 545; *National Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443; *Swope v. Leffingwell*, 105 U. S. 3, 26 L. Ed.

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939; *Wright v. Lee*, 2 S. D. 596, 51 N. W. 706; *Wright v. Lee*, 4 S. D. 237, 55 N. W. 931; *Eastern etc. Loan Ass'n v. Snyder*, 98 Va. 710, 37 S. E. 298. Where there is a penalty attached for a foreign corporation's doing business in a state in contravention of local laws, this penalty is exclusive. *Toledo etc. Lum. Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. 925; *State Mut. Fire Ins. Ass'n v. Brinkley Stone etc. Co.*, 61 Ark. 1, 31 S. W. 157, 54 Am. St. 191, 29 L. R. A. 712; *Kindel v. Beck etc. Lith. Co.*, 19 Colo. 310, 35 Pac. 538; *Edison General Elec. Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 36 Pac. 260, 40 Am. St. 910, 24 L. R. A. 315; *Rochford Ins. Co. v. Rogers*, 9 Colo. App. 121, 47 Pac. 848.

F. C. Kapp, for respondent, to the point that the contract was void, cited: *McCanna etc. Co. v. Citizens' Trust etc. Co.*, 74 Fed. 597; *Diamond Glue Co. v. United States Glue Co.*, 103 Fed. 838; *Myers Mfg. Co. v. Wetzel* (Tenn.), 35 S. W. 896; *United States Rubber Co. v. Butler Bros. Shoe Co.*, 132 Fed. 398; Clark & Marshall, *Private Corporations*, pp. 2715-2724; 6 Cyc. 123, 124; *National Inv. Co. v. National Sav. etc. Ass'n*, 49 Minn. 517, 52 N. W. 138; *Anderson v. Cleburne etc. Loan Ass'n* (Tex. App.), 16 S. W. 298; *Denson v. Chattanooga etc. Loan Ass'n*, 107 Fed. 777; *Illinois etc. Loan Ass'n v. Walker* (Tenn.), 42 S. W. 191; *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; *Henni v. Fidelity etc. Loan Ass'n*, 61 Neb. 744, 86 N. W. 475, 87 Am. St. 519.

RUDKIN, J.—On or about the 1st day of July, 1902, the plaintiff was the owner of three contracts in the Western Home Building Association, a corporation organized and existing under the laws of this state, by the terms of which he agreed to pay said association the sum of \$2.50 per month on each contract. The general plan on which the business of the association was conducted is not material on this appeal. On the above date the plaintiff entered into an agreement with the defendant herein, whereby the plaintiff ac-

cepted three contracts in the defendant association, of like character, in lieu of the three contracts in the former association, and was given credit on said new contracts for the sum of \$52.50 paid on the old contracts in the former association. The plaintiff paid the transfer fee and the monthly installments on the new contracts for the months of July, August, September, and October, 1902, amounting in all to the sum of \$36, but no further installments were paid. On or about the 21st day of October, 1903, the defendant notified the plaintiff, that the three last mentioned contracts still stood in his name, and that he was the owner thereof; that there were back dues for thirteen months unpaid thereon; that the original contracts could not be found; and that if the plaintiff desired to pay such back dues copies of the original contracts would be forwarded to him.

In addition to the foregoing facts, the amended complaint alleged that the defendant falsely and fraudulently represented to the plaintiff that the said Western Home Building Association was insolvent, and would not be able to mature plaintiff's said contracts; that the defendant was perfectly solvent and would be able to mature the same; that the defendant was duly authorized to do business in the state of Washington, and that the plaintiff would be protected by the laws thereof; that the falsity of said representations were known to the defendant and unknown to the plaintiff; and that the defendant never intended to perform said contracts, but induced the plaintiff to make such exchange for the purpose of defrauding him and depriving him of his rights and property by means of a transfer of said contracts to a foreign corporation which had not, and could not, comply with the laws of this state. The prayer of the amended complaint was for a decree cancelling and annulling said contracts, and for the recovery of the \$88.50 paid thereon.

The court below found, among other things, that the defendant was a corporation organized and existing under the laws of the state of California, with power to do a saving and

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loan and investment business on the building society plan, and that said corporation had not complied with the laws of this state relating to foreign building and loan associations, but the court found against the plaintiff on the questions of fraud as above set forth. As a conclusion of law, the court found that the three contracts were null and void and of no force or effect. On these findings a decree was entered, declaring the contracts null and void, and awarding the plaintiff a personal judgment against the defendant in the sum of \$82.50, being the aggregate of the several amounts paid thereon. The defendant thereafter gave notice of appeal to this court, and filed a bond conditioned both as a cost and supersedeas bond in the sum of \$750.

The respondent moves to dismiss the appeal on three grounds: (1) Because the amount in controversy is less than \$200; (2) because no sufficient appeal bond was given or filed; and (3) because the notice of appeal is defective and insufficient. The constitutional provision limiting the appellate jurisdiction of this court to civil actions at law for the recovery of money, where the original amount in controversy exceeds \$200, has no application to causes of equitable cognizance, and the jurisdictional question is determined from the nature of the action, as disclosed by the pleadings, and not from the form or amount of the judgment. This action was brought to cancel certain contracts executed without authority and procured by fraud. Such an action is of equitable cognizance, and within the appellate jurisdiction of this court regardless of the form of the judgment or the amount in controversy.

In support of the second ground, it is contended that the court below fixed the amount of the supersedeas bond in the sum of \$750, and that a bond in that sum conditioned as both a cost and supersedeas bond is insufficient. While the decree annulled certain contracts, in addition to the award of a personal judgment, yet that portion of the decree annulling the contracts was self-executing, and could not be super-

seded. The only part of the judgment that could be superseded or stayed was the personal judgment in the sum of \$82.50, and the cost of suit. The law fixes the amount of the supersedeas bond in such cases, and an order of court fixing a bond in a different amount is nugatory. Inasmuch as the bond given was double the amount of the judgment and costs and \$200 additional, it was sufficient under the statute.

The third ground of the motion is that the judgment appealed from is not sufficiently described in the notice of appeal. The notice described the judgment as "The final judgment rendered and entered in the above entitled cause." It is customary to describe the judgment by reference to the date of its entry, but this court has held that a mistake in the date does not vitiate the notice. It is not claimed that the description in the notice could apply to more than one judgment or that the respondent was misled thereby. The notice of appeal was therefore sufficient. The motion to dismiss is denied.

The respondent further moves to strike the statement of facts for the reason that no sufficient exceptions were taken to the findings of facts. The only exception taken was in these words: "To the making of the foregoing findings of fact the defendant excepts and an exception is hereby allowed." That such an exception is insufficient to authorize a review of the testimony has often been decided by this court. *Peters v. Lewis*, 33 Wash. 617, 74 Pac. 815, and cases cited. The motion to strike is therefore granted.

The only remaining question is, do the findings of fact sustain the judgment? As heretofore stated, the conclusion that the contracts were null and void is based solely upon the fact that the appellant is a foreign corporation authorized to do a saving and loan and investment business on the building society plan, and has not complied with the laws of this state relating to foreign building and loan associations. The legal status of contracts entered into by foreign corporations,

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without first complying with the laws of the state in which the contract is made, has been the subject of much controversy. In *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, 31 Pac. 327, this court held that the failure of a foreign corporation to comply with the requirements of the laws of this state regulating foreign corporations, does not invalidate contracts entered into without such compliance. This case was followed in *La France Fire Engine Co. v. Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. 827, the court saying:

"It is a general proposition, sustained by the weight of authority, that where a statute imposes a penalty for failure to comply with statutory requirements, the penalty so provided is exclusive of any other; at least, no other penalty will be implied. See Morawetz on Private Corporations, Sec. 665, and cases cited. Our statute does not provide that the contracts made by foreign corporations which do not comply with the provisions of the statute shall be void, but fixes a special penalty for such a violation, and in the absence of a special declaration that such contracts shall be void, especially where a penalty is attached for the violation, the party contracting with such corporation will be estopped from pleading the want of compliance with the statute by the foreign corporation. This rule was announced by this court, after a pretty thorough investigation of the subject, in *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67 (31 Pac. 327), and as we are satisfied with the rule announced in that case we will follow it in this."

These decisions have been followed in other cases and must now be considered the settled law of this state, so far as the statutes then under consideration are concerned. Is there any substantial difference between the act regulating foreign corporations in general, and the act regulating foreign building and loan associations? Bal. Code, § 4291, provides that foreign corporations, incorporated for any purpose for which domestic corporations may be formed under the laws of this state, may sue and be sued, acquire and hold property, trans-

act busineses, etc., by a compliance with the succeeding sections of the statute. Section 4298, provides that, "Any agent of any foreign corporation, conducting or carrying on business within the limits of this state, for and in the name of such corporation, contrary to any of the provisions of this chapter, shall be deemed guilty of a misdemeanor," etc. Bal. Code, § 4403, provides that, "Every building and loan association organized under the laws of any other state, territory, or nation shall, before commencing to do business in this state," comply with certain requirements therein specified. Section 4417, provides that,

"Any officer, director, or agent, of any foreign building and loan association, or any other person whomsoever who shall, in this state, solicit subscriptions to the stock of such association, or who shall sell or issue, or knowingly cause to be sold or issued, to a resident of this state any stock of such association while such association shall not have had the certificate of the state auditor authorizing it to do business in this state, as herein prescribed, or has not deposited, as required by this chapter, securities of the value and at the times herein prescribed, or before said association has complied with all the provisions of this chapter, or when said association shall have been notified and required to discontinue business in this state, as hereinbefore provided, shall be guilty of a misdemeanor," etc.

It will thus be seen that each statute imposes a penalty for transacting business within the state without first complying with the provisions thereof, and neither statute declares that contracts entered into without such compliance shall be void. It would serve no useful purpose to review the decisions in other jurisdictions as they are based on a difference in the language of the statutes under consideration, or on a difference of opinion as to the policy which is supposed to underlie such statutes, and not upon any distinction between building and loan associations and other corporations. We are therefore of opinion that the contracts in suit were not void by reason of any of the facts set forth in the findings

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of the court, and that the findings do not support the judgment.

The judgment must therefore be reversed, with directions to dismiss the action, and it is so ordered.

MOUNT, C. J., DUNBAR, CROW, FULLERTON, HADLEY, and ROOT, JJ., concur.

[No. 5802. Decided November 22, 1905.]

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AMANDA HAMMOCK, *Appellant*, v. THE CITY OF TACOMA,
Respondent.¹

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—CLAIM AND NOTICE OF INJURY—DEFINITENESS AS TO PLACE—SUFFICIENCY. A notice of claim for injuries, sustained upon a city sidewalk, which describes the place as on the east side of J street between 41st and 42d streets, is a sufficient compliance with a charter requirement that it shall describe the place, although the accident occurred between 41st and 43d streets, there being no 42d street intersecting J street; since there was evident a *bona fide* effort to comply with the law and no intention to mislead, and a description sufficient to identify the place and enable one to find it.

SAME—PLEADING—COMPLAINT—MISTAKE AS TO DATE OF PRESENTATION OF CLAIM—AMENDMENT UPON REVERSAL. Where a demurrer to a complaint against a city for personal injuries was interposed on the ground that the notice of claim did not sufficiently identify the place, and was at variance with the complaint, a claim cannot be first made in the supreme court that the notice appears by its date to have been filed one day too late, where the plaintiff claims the date to be a clerical error, and especially where the complaint alleges that it was filed within time.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered March 3, 1905, in favor of the defendant, upon sustaining a demurrer to the amended complaint, dismissing an action for personal injuries sustained through a fall on a defective sidewalk. Reversed.

¹ Reported in 82 Pac. 893.

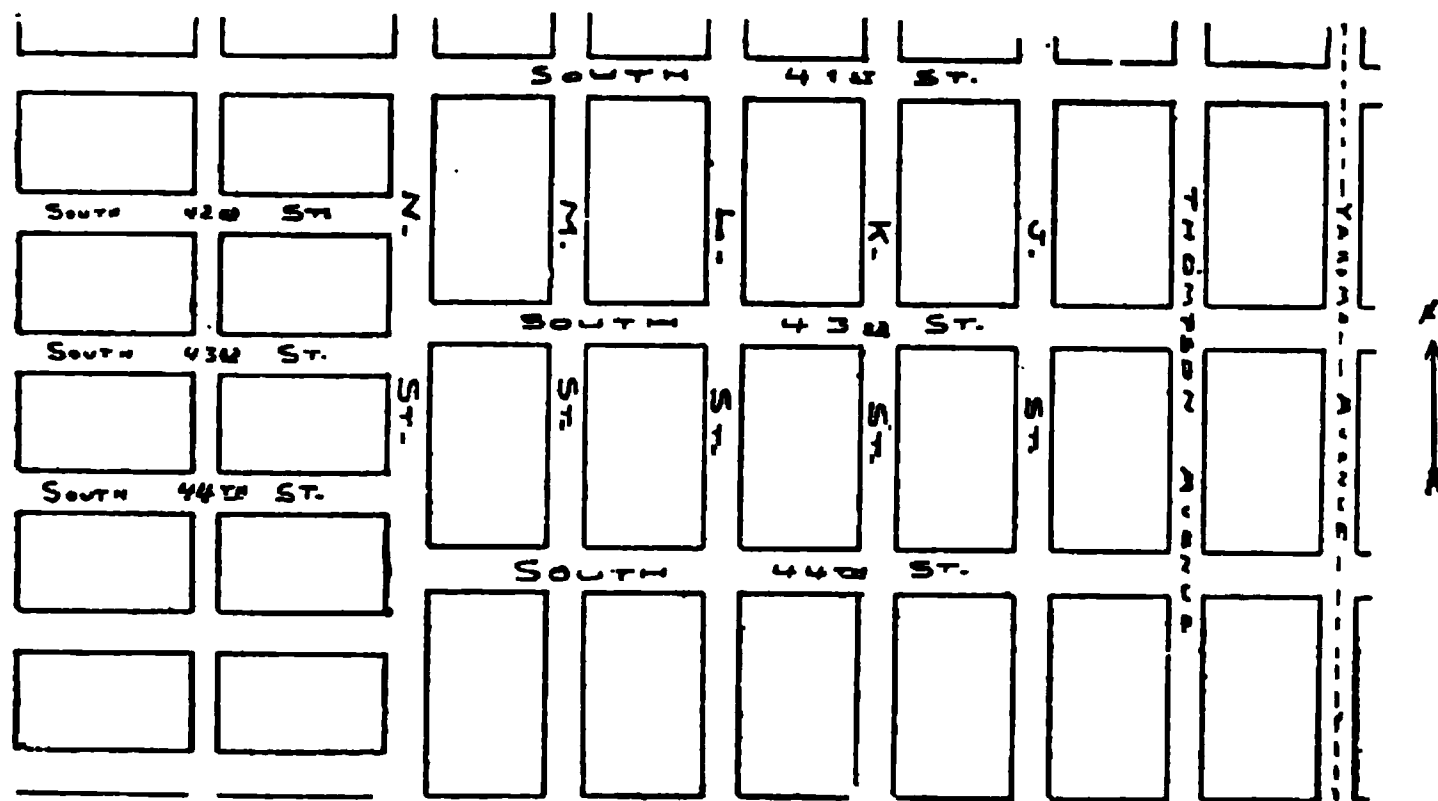
Govnor Teats, for appellant, cited: *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386; 5 Thompson, Negligence, §§ 6330-6332; *Fuller v. Hyde Park*, 162 Mass. 51, 37 N. E. 782; *Harder v. Minneapolis*, 40 Minn. 446, 42 N. W. 350; *Lyons v. Red Wing*, 76 Minn. 20, 78 N. W. 868; *Lincoln v. O'Brien*, 56 Neb. 761, 77 N. W. 76; *Lincoln v. Pirner*, 59 Neb. 634, 81 N. W. 846; *Owen v. Fort Dodge*, 98 Iowa 281, 67 N. W. 281; *Wheeler v. Detroit*, 127 Mich. 329, 86 N. W. 822; *Cross v. Elmira*, 86 Hun 467, 33 N. Y. Supp. 947; *Hein v. Fairchild*, 87 Wis. 258, 58 N. W. 413; *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138.

O. G. Ellis, J. J. Anderson, and R. E. Evans, for respondent, upon the point that the notice was insufficient, cited, *inter alia*: *Mears v. Spokane*, 22 Wash. 323, 60 Pac. 1127; *Learned v. Mayor*, 21 Misc. Rep. 601, 48 N. Y. Supp. 142; *Trost v. Casselton*, 8 N. D. 534, 79 N. W. 1071; *Sowle v. Tomah*, 81 Wis. 349, 51 N. W. 571; *Maloney v. Cook*, 21 R. I. 471, 44 Atl. 692; *Biesiegel v. Seymour*, 58 Conn. 43, 19 Atl. 372; *Rauber v. Wellsville*, 82 N. Y. Supp. 9; *Weber v. Greenfield*, 74 Wis. 234, 42 N. W. 101; *Shallow v. Salem*, 136 Mass. 136; *Dalton v. Salem (Mass.)*, 28 N. E. 567; *Post v. Foxborough*, 131 Mass. 202.

DUNBAR, J.—This is an appeal from a judgment of dismissal, rendered upon the order of the court sustaining a demurrer to appellant's amended complaint. There seems to be no merit in the motion to dismiss. The allegations of the complaint were to the effect that the plaintiff, an elderly woman, while walking along a sidewalk upon the east side of J street in the city of Tacoma, about half way between South Forty-third and South Forty-first streets, on the 12th day of June, 1904, was severely injured through a fall caused by a broken and rotten plank in the walk. The situation is shown by the accompanying diagram:

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The language of the claim notice is as follows:

"For personal injuries, occurring to her [plaintiff] on South J street between South Forty-first and South Forty-second streets, in the city of Tacoma, through a defective sidewalk at the point on June 12, 1904, \$2,000."

The affidavit accompanying the notice alleges:

"That, on the 12th day of June, 1904, at about the hour of 2 o'clock of said day, while walking with her daughter, Mrs. Mary Bradshaw, along and upon the sidewalk upon the east side of J street in the city of Tacoma, at a point about half way between South Forty-second and South Forty-first streets, she was permanently injured," etc.

It appears that South Forty-second street had not been extended from N street to J street, a distance of four blocks, and that the next street from Forty-first street, traveling south on J street, is Forty-third street; so that the point where the injury actually occurred was about half way between Forty-first street and Forty-third street, instead of half way between Forty-first and Forty-second streets, as stated in the notice. But we think this discrepancy was not sufficient to debar the plaintiff from her right of action. It is evident that the city authorities in looking for this place could not have been misled, for they were notified that the accident occurred on the east side of J street. They were also notified that it was at

some point south of Forty-first street. When they repaired to J street, looking for the place of accident and traveling towards Forty-third street, they would notice that there was no Forty-second street intersecting the east side of J street, and would naturally conclude that the street that was meant was the next street south of Forty-first street, a natural conclusion to be arrived at by the claimant who knew that her starting point was Forty-first street and that she was hurt between that and the intersection of the next street.

A great many cases are cited by both respondent and appellant on the proposition of the definiteness required by the notice in such cases as this, but we think there are no cases that sustain the court in holding that this notice was insufficient. The charter provision requires that such writing shall state the time, place, cause, nature, and extent of the alleged injuries, so far as practicable. There is nothing any more sacred about a notice of the place where an injury occurred than there is in any pleading in a case. The object is to give information, and when that information is given in a practicable manner, the requirements of the law are met. Mr. Thompson, in his Commentaries on the Law of Negligence, Vol. 5, § 6330, voices the almost uniform sentiment of the courts on this subject in the following statement:

"It is manifestly sufficient if, in such a notice, the *place* where the accident took place is described so as to identify it with *reasonable certainty*, and so that the proper investigating officer can *find it from the description*, aided by a reasonable inquiry, and that it is not calculated to mislead. Clearly, such a notice sufficiently designates the place of the accident when its descriptive words are such that, with the notice in hand, there can be no trouble in finding the place. On the other hand, it seems to be a just conclusion that, as it is the purpose of such statutes to furnish the proper municipal officers with the same facilities for ascertaining the condition of the place causing the injury that the injured party has or could reasonably have, the notice given by him *ought to be sufficient to that end*. Moreover, where there has been a *bona-fide* effort to comply with the statute and there has

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been *no intention to mislead*, it is a sound and just rule which opens the door of the court to an inquiry whether the notice *did in fact mislead*. If it did not in fact mislead, but if its deficiencies or mistakes were helped out by other information given to the proper officers, or by other knowledge on their part, no matter how acquired, then it would turn the statute into a mere trap for the ignorant and unskillful, to deprive them of a right of action because of failing to do something which caused the municipality no injury and put it to no disadvantage."

Many cases are cited by the author to sustain the text, where greater discrepancies in the location of the place existed than in the notice in the case at bar. But this court has uniformly held that the provisions of such statutes should be liberally construed. In *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138, it was held that, in an action against the city for damages received by reason of the defective condition of a certain highway, it was an immaterial variance for the complaint to describe the place of injury as a "sidewalk" while the claim presented against the city prior to suit described it as a "crosswalk." In *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386, the rule was announced as follows:

"The object of the law, doubtless, is to protect the municipality from fraudulent claims, by enabling its officers not only to examine the *locus in quo*, to see if the city had been negligent, but to obtain witnesses and procure testimony, by drawings and photographs, to be used if deemed necessary in resisting the claim, and generally to investigate the demand while it is fresh and while evidence is obtainable, and for the purpose of compromising or paying said claim if it is deemed a just and legal one; and such provisions are universally sustained if they are reasonable in time and demand. But while the law must be a reasonable one, a reasonable compliance with its terms is all that can be demanded; . . ."

The same spirit of liberality was manifested in the opinion in *Bell v. Spokane*, 30 Wash. 508, 71 Pac. 31, where it was said:

"The charter provision is essentially one of notice, and was probably intended to enable cities to repair defective

sidewalks, and thereby prevent further liability, to give them an opportunity to settle the claim without the expense of a lawsuit, and also an opportunity to obtain and preserve testimony in relation to the condition of the street, and the circumstances surrounding the accident; and was not intended as a stumbling block or a pitfall to prevent recovery by meritorious claimants."

It seems to us that the notice in this case was sufficient to give the city the notice contemplated by the ordinance.

In the respondent's answering brief it is contended that the complaint was insufficient, for the reason that it states upon its face that the accident happened on the 12th day of June, and that the claim was filed on the 13th day of the following July; thereby showing that the charter provision with reference to filing the claim within thirty days after the alleged accident has not been complied with. The appellant in her reply brief states that she has been taken by surprise by this claim on the part of the respondent, and that the figures "13th" are a clerical error; that the claim was actually filed on the 12th day of July; that this was known to the respondent city; that, in addition thereto, this question was not raised in the court below, and that the respondent ought not to be heard to urge it here for the first time. Investigation of the record satisfies us that the appellant was not called upon to defend the sufficiency of the complaint outside of the propositions of the insufficiency of the notice and the variance of the complaint and notice as to place, and that the demurrer interposed in the court below did not reach to the questions now sought to be reached. In addition to this, the complaint alleges that the notice was filed within thirty days after the accident occurred. So that, at the most, there was only a seeming contradiction in the allegations of the complaint.

The judgment in this case will have to be reversed. The appellant will be allowed to amend her complaint in rela-

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tion to the date of the service of the notice, and with such amendment the cause will proceed to trial.

MOUNT, C. J., CROW, ROOT, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 5827. Decided November 23, 1905.]

THE STATE OF WASHINGTON, *on the Relation of Spring Water Company, Appellant*, v. THE TOWN OF MONROE *et al., Respondents*.¹

COUNTIES—COUNTY COMMISSIONERS—FRANCHISE FOR LAYING WATER PIPES IN HIGHWAY—AUTHORITY TO GRANT. The county commissioners have no power to grant a franchise or permit to a water company for the purpose of laying water pipes under or along a public highway, since the power must be derived from the legislature, and cannot be implied from Bal. Code, § 342, giving them power to lay out and construct county roads.

SAME—VOID FRANCHISE—PLEA OF RATIFICATION—NO ESTOPPEL IN CASE OF ULTRA VIRES. A water company that has made expenditures in reliance upon a franchise granted by public officers having no power to do so cannot claim a ratification, since the plea of estoppel does not prevail against the defense of *ultra vires*.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered May 27, 1905, in favor of the defendants, on the pleadings, dismissing an application for a writ of mandamus to compel a town to grant a permit for the extension of a water system. Affirmed.

Blaine, Tucker & Hyland, for appellant.

Cooley & Horan and *Bell & Austin*, for respondents.

RUDKIN, J.—The appellant here applied to the court below for a writ of mandate against the mayor and town council of the town of Monroe. The application for the writ sets

¹Reported in 82 Pac. 888.

forth the following facts: That the relator is a corporation organized and existing under the laws of the state of Washington; that, on the 17th day of June, 1901, the board of county commissioners of Snohomish county granted to the relator the right, privilege, authority, and franchise to lay down and maintain a line or lines of water mains or pipes, along streets and alleys in Monroe and Tyee City, in said Snohomish county, and along and across certain county roads in said county, for a period of fifty years from the date thereof; that immediately thereafter the relator, by authority of said franchise, and with the knowledge and approval of the board of county commissioners of said county and the inhabitants of said town of Monroe, laid water pipes in the streets and alleys of said town, at a cost of upwards of \$3,500; that thereafter and in the month of January, 1903, the town of Monroe was incorporated as a town of the fourth class, under and by virtue of the laws of the state of Washington, and that the respondents are the mayor and town councilmen of said town; that on the 11th day of February, 1903, the town of Monroe passed an ordinance providing that no person or corporation should build, lay, construct, maintain, or extend any sewer or water system under any street, alley, sidewalk, or crosswalk, or make any excavation of the same within the town of Monroe, without first obtaining a permit so to do from the town council, and imposing a penalty for any violation thereof; that on the 7th day of April, 1904, one Frank Donner applied to the mayor and town council for a permit to construct a ditch from his residence to the center of one of the streets of the town, for the purpose of connecting with the relator's water system; that on the 13th day of April, 1904, the permit was refused, and that the respondents, without cause and without right, refused to permit the relator to connect its water system with any dwelling or business place in said town, or to extend its mains within the town in any manner whatever; and that the relator has no plain, speedy, or adequate remedy at law.

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The petition prayed for a writ of mandate requiring the mayor and town council to grant a permit as theretofore requested by the said Donner, and to permit and allow the relator to exercise and enjoy the rights and privileges theretofore granted to it by the board of county commissioners of said Snohomish county. An answer and reply were filed, but inasmuch as the court below granted judgment against the relator on the pleadings, a further statement of the issues is not material. From the order denying the writ, this appeal has been prosecuted.

Two questions are discussed in the briefs and argument of counsel; first, the authority of the board of county commissioners to grant the alleged franchise; and second, the question of estoppel. It would seem apparent that a board of county commissioners in this state has no power to grant any such privilege or franchise as is claimed in this case. The board has power to lay out, discontinue, or alter county roads or highways within their respective counties, and to do all other necessary acts relating thereto according to law, except in incorporated cities and towns where, by the terms of the act of incorporation, jurisdiction over the roads in the limits of such incorporations is vested in the corporate authorities thereof. Bal. Code, § 342. The privilege of laying water pipes under or along a public highway would seem to be wholly foreign to any express or implied power conferred by the above statute. Furthermore, the power to grant a franchise such as is here claimed must be derived from the legislature. It will not be implied even in favor of a municipal corporation, whose control over the public streets within its limits is ordinarily much greater than that conferred upon the county commissioners over public highways.

“In Great Britain express legislative sanction is necessary to warrant the laying down of *gas pipes* in the public highways; and so in this country it is also considered that the right to the use of the public streets of a city by a gas company, for the purpose of laying down its pipes, is a franchise which can be granted only by the legislature, or some local

or municipal authority empowered to confer it." 2 Dillon Mun. Corp. (4th ed.), § 691.

The same principle applies to the water pipes and sewers. Id., § 697.

Nor is there any foundation for the contention that the respondents are estopped to question the validity of the franchise claimed by the appellant. The appellant acquired its franchise from public officers whose powers are limited and defined by law. To permit the plea of ratification or estoppel to prevail against the defense of *ultra vires* in such cases would wholly deprive the public of the safeguards which the law intended for their protection in limiting and defining the powers of their public servants. As said by this court in *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063,

"The power to ratify a particular contract presupposes the power to make it in the first instance; and, if it is such that it could not be made originally except in a certain prescribed mode, where that mode is disregarded the power to ratify does not exist. A contract which is invalid because not authorized by law cannot be made valid and binding retroactively by any subsequent action of the corporate body, and a liability be thereby fastened upon the corporation."

In *State v. Pullman*, 23 Wash. 583, 63 Pac. 265, 83 Am. St. 836, the court quoted with approval 2 Herman on Estoppel, page 1365, as follows:

"The true principle in such cases is well settled that one cannot do indirectly, what cannot be done directly, and, where there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel. Where there is power, and it is irregularly exercised, or there are defects and omissions in exercising the authority conferred by law, the doctrine of equitable estoppel may well be applied by courts."

In that case the court further said:

"It is claimed, however, by the appellant, that, having received the benefits of the contract which the city entered into, it ought to be estopped from denying its validity; also

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that it had ratified the contract by receiving the benefits. It is well established that the power to ratify is coextensive only with the power to contract, and that an act which was illegal for want of authority on the part of the contracting powers cannot be ratified. There has been a conflict of opinion on some branches of this question, but an investigation of the authorities will show, we think, that where courts have estopped municipalities from interposing the plea of *ultra vires*, and from escaping the responsibility of their acts, it has been where there has been a defect in the execution of the contracts, as in the issuance of bonds, etc., and not where there has been an absolute want of power on the part of the municipality to contract."

See, also, Dillon, Mun. Corp., *supra*, § 457; *Detroit v. Detroit City R. Co.*, 60 Fed. 161.

The case of *Spokane St. R. Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072, is not in point. The city council had the power to grant the franchise there in controversy, in the first instance. It was a case of the defective or irregular exercise of an existing power, and not a case where the power to act in the first instance was entirely lacking.

There is no error in the record, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, DUNBAR, ROOT, and CROW, JJ., concur.

[No. 5770. Decided November 25, 1905.]

O. B. LITTELL, *Respondent*, v. GEORGE W. SAULSBERRY *et al.*,
Appellants.¹

MECHANICS' LIENS—BUILDING MATERIALS—FORECLOSURE—PARTIES. Where a contractor was doing business under the name of "Western Mill Factory," a contract made with him in such name shows that he is the real party in interest entitled to enforce a mechanics' lien therefor.

CONTRACTS—ASSENT—CONSTRUCTION—EXTRAS. Where a written offer to furnish mill material for a building at a certain sum, extras to be paid for at a reasonable price, was accepted upon condition that there should be no charge for extras, and thereafter the contract is acted upon without further communication, the contractor must be held to have assented, and cannot recover for extras.

MECHANICS' LIENS—ATTORNEY'S FEES—CONSTITUTIONALITY. Bal. Code, § 5811, authorizing an attorney's fee in favor of the plaintiff in an action to foreclose a mechanics' lien, is not unconstitutional.

MECHANICS' LIENS—ATTORNEY'S FEES—AMOUNT. Where the only contest in an action to foreclose a mechanics' lien was over the sum of \$73.63, demanded for extras, the allowance of \$100 for attorney's fees is exorbitant, and should be reduced to \$50, in the absence of satisfactory evidence in the record as to what a reasonable fee would be.

SAME—EVIDENCE. Upon an issue as to the reasonable value of an attorney's fee for the foreclosure of a mechanics' lien, cross-examination as to the amount involved in the case is proper.

Appeal from a judgment of the superior court for King county, Morris, J., entered April 5, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a material-man's lien. Modified.

George W. Saulsberry and S. H. Steele, for appellants.

Thomas T. Littell, for respondent.

CROW, J.—This action was instituted by the respondent, O. B. Littell, against the appellants George W. Saulsberry

¹Reported in 82 Pac. 909.

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and L. C. Saulsberry, his wife, to foreclose a materialman's lien on certain of their community real estate in the city of Seattle. Early in June, 1904, appellant George W. Saulsberry telephoned to the Western Mill Factory that he desired to contract for the purchase of all lumber necessary to complete a house he was then building. Respondent, O. B. Littell, doing business as the Western Mill Factory, forthwith went to said house and after inspecting the same and having a conference with one Olen, who was in charge, made the following written offer to appellants:

"Office of O. B. Littell, Western Mill Factory, Terry Ave. and Mercer Street, Seattle, Washington, June 14, 1904.

"Mr. G. W. Saulsberry, 16th and Aloha.

"Dear Sir: We submit this, our proposal to furnish the items enumerated below for _____ building, located on lot _____, in block _____, _____ Addition to the City of Seattle, for the sum of \$312.00. It is understood that we are to receive payments from time to time as the materials are delivered and that we are to furnish such extra materials for this building as may be ordered from time to time at the market rate, and that the inside finish of said building is to be of fir, unless otherwise specified.

"It is also understood and agreed by the party to whom this proposal is made, that the Western Mill Factory is not in any event to be held liable or responsible for any failure or delay in the fulfillment of this proposal resulting from strikes, accidents, or other causes, beyond its control.

"Western Mill Factory,

"By _____.

"Read the above carefully."

This offer was made on a printed form used by respondent and had attached thereto a detailed statement of the items of lumber to be furnished. In response to this offer appellant George W. Saulsberry wrote the following letter:

"Seattle, Washington, June 17, 1904.

"Western Mill Factory, Terry Ave. & Mercer St., City.

"Gentlemen: I am in receipt of your bid or proposition to furnish the material for inside finishing and porch for dwelling at 16th & Aloha, for \$312.00.

"While I have one bid for a little less money, owing to the fact that my carpenter gives you such a high recommendation, I have decided to accept your bid, but I do this with the understanding that this includes all material to finish said building, and Mr. Olen says, that he has given it as full as he can and honestly thinks that every item was mentioned to you with exceptions of possibly about 200 lineal feet of 8-inch boards dressed on four sides for book shelves. I suppose that you can and will furnish that without any additional charge. What I dislike is a lot of extras.

"I hope that you will get at this and get it ready by the time the carpenters are in need of it which will be within ten days. Yours very truly, G. W. Saulsberry."

These two communications constitute all the correspondence between the parties. Respondent, without further negotiations, proceeded to furnish said lumber, but now claims that he furnished extras to the total value of \$73.63. No payments being made, a lien notice was filed for said contract price, and said extras. The trial court made findings of fact and conclusions of law in favor of respondent, and entered judgment and decree of foreclosure thereon for \$385.63 the contract price and extras, \$100 attorney's fee, the expense of recording the lien notice, and costs. From said final judgment this appeal has been taken.

Appellants' first contention is that they did not contract with O. B. Littell, but with the Western Mill Factory; that the complaint fails to allege that said respondent was doing business as the Western Mill Factory, or to identify him with said factory, and that he cannot recover in this action. The complaint alleges, and the proof shows, said lumber to have been furnished by respondent who filed the lien notice. It also appears from the evidence, especially the written proposition made by respondent, that he was doing business as the Western Mill Factory. Respondent was therefore the real party in interest as plaintiff herein.

Appellants also contend that under respondent's contract in pursuance of which the material was furnished, there could

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be no charge for extras, in other words, that respondent was bound by his contract to furnish all lumber necessary to complete said building. The trial court found against the appellants on this contention, but such finding does not seem to be supported by the evidence. Although respondent in his offer used the words: "It is understood . . . that we are to furnish such extras for the building as may be ordered from time to time at the market rate," yet, said offer as made was never accepted, nor was it ever agreed to by appellants. On the contrary Mr. Saulsberry in his written answer expressly stated: "I have decided to accept your bid, but I do this with the understanding that this includes all material to finish said building." Respondent, without objecting to this conditional acceptance of his bid, at once proceeded to furnish the lumber. By reason of this action he must be held to have assented to appellants' terms, and to have contracted to furnish all necessary lumber for the total price of \$312. There is some attempt on the part of respondent to show that changes were made in the building, also that the extras were ordered by an authorized agent of appellants, but such evidence is not at all satisfactory, nor is it sufficient to sustain his contention, or to show that appellants incurred any additional liability for extras. The honorable trial court erred in finding appellants to have been indebted to respondent in any greater sum than \$312, the original contract price.

The court allowed respondent an attorney's fee of \$100 and appellants now contend that the provision for such fee contained in Bal Code, § 5911, is unconstitutional and void. This question has been repeatedly determined by this court against appellants' contention, and we see no reason for changing our previous rulings. *Ivall v. Willis*, 17 Wash. 645, 50 Pac. 467; *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571; *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147.

Appellants also contend that the fee allowed was exorbitant. We think this contention should be sustained. It ap-

pears from the testimony of one of respondent's own witnesses, a collector, that appellants expressed a willingness to pay \$312, the contract price, in full settlement of respondent's claim, but that said collector refused to accept the same. Appellants, however, did not make any tender nor have they paid any part of said \$312 into court, for respondent's benefit. Still the only substantial contest in this action has been waged over the said sum of \$73.63 demanded for extras. Only one witness gave testimony as to what would be a reasonable attorney's fee, as follows:

"Q. In the foreclosure of a lien for material furnished, involving about three hundred and eighty-five dollars and sixty-three cents, a suit that has been hardly contested from the time of the filing of the pleadings and the commencement of the action, and which has involved practically a full day's trial, contested throughout, what would you say would be the reasonable value of an attorney's fee to be allowed in that case? A. I should think one hundred dollars would be a reasonable fee."

On cross-examination the witness was asked, "Q. What would be a reasonable fee if there were seventy-three dollars involved?" To this question an objection was sustained and no further testimony was given. We think such cross-examination was proper, \$73.63 being the only substantial amount contested. By reason of such ruling, the record is devoid of any satisfactory evidence as to what would be a reasonable fee herein. Under such circumstances, we think the trial court, or the members of this court on appeal, by reason of their personal knowledge of the value of services rendered by attorneys, can fix such reasonable value. This court in *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1072, reduced an attorney's fee from \$2,000, allowed by the trial court, to \$1,000, although the lowest fee fixed by any witness was \$1,500. We are of the opinion that \$50 would have been an ample allowance to make the respondent for an attorney's fee in this action.

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It is ordered that the judgment of the superior court be so modified as to allow judgment in favor of respondent for \$312 with interest, the cost of recording lien notice, and \$50 attorney's fee, together with costs in the superior court. Appellants will recover costs in this court.

MOUNT, C. J., ROOT, RUDKIN, FULLERTON, HADLEY and DUNBAR, JJ., concur.

[No. 5944. Decided November 25, 1905.]

THE STATE OF WASHINGTON, *on the Relation of*
Valentine Miller et al., Plaintiff, v. THE
SUPERIOR COURT FOR SPOKANE
COUNTY, *Respondent.*¹

PROHIBITION—WHEN LIES—PREVENTING FURTHER PROCEEDINGS AFTER DENIAL OF APPLICATION FOR CHANGE OF VENUE—ADEQUACY OF REMEDY BY APPEAL. Prohibition does not lie to prevent the superior court from proceeding to try a case, although it may be without jurisdiction by reason of the erroneous denial of an application for a change of venue; since there is an adequate remedy by appeal, which is the test to be applied upon all applications for extraordinary writs; and the delay or expense incident to an appeal does not affect the adequacy of the remedy.

Application filed in the supreme court November 10, 1905, for a writ of prohibition to restrain the superior court for Spokane county, Kennan, J., from further proceeding in a cause after having denied an application for a change of venue. Writ denied.

Zent & Lovell, for relators.

Belt & Powell, for respondent.

RUDKIN, J.—J. A. Harris commenced an action in the superior court of Spokane county to recover a money judgment against Valentine Miller, George Zier and Conrad

¹Reported in 82 Pac. 875.

Kissler. The defendants Miller and Zier appeared in the action and filed a demurrer, an affidavit of merits, and a motion for change of venue to the superior court of Adams county. This motion was supported, by the affidavit of the defendant Miller to the effect that he was a resident of Adams county, at the time of the commencement of the action, and was served with process there; by the affidavit of the defendant Zier to the effect that he was a resident of Lincoln county, at the time of the commencement of the action; and by the affidavit of one of their attorneys to the effect that all of the defendants were nonresidents of Spokane county, and were actual residents of either Lincoln or Adams county at the time of the commencement of the action. The motion for a change of venue was denied, and the defendants Miller and Zier have applied to this court for a writ of prohibition, restraining the superior court of Spokane county from further proceeding in the cause, on the ground that it has no jurisdiction.

In *State ex rel. Cummings v. Superior Court* 5 Wash. 518, 32 Pac. 457, 771; *State ex rel. Campbell v. Superior Court*, 7 Wash. 306, 34 Pac. 1103; *State ex rel. Allen v. Superior Court*, 9 Wash. 668, 38 Pac. 206, and *State ex rel. Stockman v. Superior Court*, 15 Wash. 366, 46 Pac. 395, this court held, that where a defendant was sued in a transitory action in a county other than the county of his residence, and appeared in the action and filed a proper application for a change of venue, the filing of such application ousted the court of jurisdiction, and that this court would issue a writ of prohibition to restrain further proceedings in that court. If these decisions are followed in this case it will be incumbent on us to consider the merits of the application for a change of venue, otherwise not.

In *State ex rel. Townsend Gas etc. Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 933, this court reviewed at length its former decisions relating to the extraordinary writs of mandamus and prohibition, and in effect overruled many of

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them. In that case it was distinctly held that the fact that a court refuses to entertain jurisdiction where jurisdiction is conferred by law, or threatens to assume jurisdiction where jurisdiction is denied by law, is not, of itself, sufficient to warrant the issuance of a writ of mandamus or prohibition from this court. The adequacy of the remedy by appeal, or in the ordinary course of law, is there declared to be the true test in all cases, and not the mere question of jurisdiction or lack of jurisdiction. *State ex rel. Townsend Gas etc. Co. v. Superior Court* has been followed and approved in many subsequent cases: *State ex rel. Barbo v. Hadley*, 20 Wash. 520, 56 Pac. 29; *State ex rel. McIntyre v. Sup'r Ct.*, 21 Wash. 108, 57 Pac. 352; *State ex rel. Washington Dredg. etc. Co. v. Moore*, 21 Wash. 629, 59 Pac. 505; *State ex rel. Hibbard & Co. v. Sup'r Ct.*, 21 Wash. 631, 59 Pac. 505; *State ex rel. Lewis v. Hogg*, 22 Wash. 646, 62 Pac. 143; *State ex rel. Cann v. Moore*, 23 Wash. 115, 62 Pac. 441; *State ex rel. Hubbard v. Superior Court*, 24 Wash. 438, 64 Pac. 727; *State ex rel. Stratton v. Tallman*, 25 Wash. 295, 65 Pac. 545; *State ex rel. Stratton v. Tallman*, 29 Wash. 317, 69 Pac. 1101; *State ex rel. Carrau v. Superior Court*, 30 Wash. 700, 71 Pac. 648; *State ex rel. Zent v. Neal*, 30 Wash. 702, 71 Pac. 647; *State ex rel. Post v. Superior Court*, 31 Wash. 53, 71 Pac. 740; *State ex rel. Port Orchard Inv. Co. v. Superior Court*, 31 Wash. 410, 71 Pac. 1100; *State ex rel. Stetson & Post Mill Co. v. Superior Court*, 32 Wash. 498, 73 Pac. 479; *State ex rel. Twigg v. Superior Court*, 34 Wash. 643, 76 Pac. 282; *State ex rel. West Seattle v. Superior Court*, 36 Wash. 566, 79 Pac. 29, and is now the established rule on the questions there discussed.

Has the relator an adequate remedy by appeal? As a general rule, the legislature of this state has deemed an appeal from the final judgment an adequate remedy for the correction of all errors committed in the course of a trial, and, ordinarily, an erroneous ruling on a question of jurisdiction is no exception to this general rule. Had the court

below ruled that the complaint stated a cause of action, or denied a motion to quash the summons, or the service thereof, it would be just as important to the relators, and just as desirable from their standpoint, to obtain a ruling from this court on these questions, in advance of the hearing on the merits, as in the case at bar; yet, all will concede that such questions can only be reviewed on an appeal from the final judgment. As said by the supreme court of Montana on a similar application, in *State ex rel. Independent Pub. Co. v. Smith*, 23 Mont. 329, 58 Pac. 867:

"If the writ be proper on the present application, then it might well be invoked to review any intermediate order or decision of a court or judge, such as an order overruling a demurrer to a complaint, or striking out irrelevant matter from a pleading, or granting or refusing a motion to quash a summons, or granting or denying a continuance. *Mandamus* may not thus be diverted from its legitimate office. From a multitude of cases supporting the conclusion here announced, we cite *People v. Sexton*, 24 Cal. 78; *People v. McRoberts*, 100 Ill. 458; *State v. Cotton*, 33 Neb. 561, 50 N. W. 688; *People v. Hubbard*, 22 Cal. 35; *People v. Judge of Twelfth Dist.*, 17 Cal. 548; *People v. Clerk of Court*, 22 Colo. 280, 44 Pac. 506; *Ex parte Chambers*, 10 Mo. App. 240; *State v. Clayton*, 34 Mo. App. 569. See, also, High, Extr. Leg. Rem. (4th Ed.) Sec. 172, and 4 Enc. Pl. & Prac. 442, 443, 492."

In *State ex rel. Wyman etc. Co. v. Superior Court*, ante, p. 443, 82 Pac. 875, just decided, this court entertained jurisdiction of an application for a writ of mandamus to compel the court to proceed with a garnishment proceeding in which it had granted a change of venue. But in that case we could not presume that the court to which the proceeding was transferred would take jurisdiction, if in fact it had none, and furthermore, the error there complained of could never be corrected by an appeal from the court in which the error was committed. We therefore held that there was no adequate remedy by appeal.

It is the general policy of our law that cases shall come to

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this court but once, and that the decision of this court shall be based on the merits of the entire controversy. The question here presented is no exception to this rule. There are additional reasons why applications of this kind should not be favored. Such applications are usually submitted in an informal manner, without adequate briefs, and often without an appearance by the adverse party. Such practice is not conducive to a proper consideration, or correct decision, of important questions of law in an appellate court. We again announce the rule that the adequacy of the remedy by appeal, or in the ordinary course of law, is the test to be applied by this court in all applications for extraordinary writs, and not the mere question of jurisdiction or lack of jurisdiction; and that the adequacy of the remedy by appeal does not depend upon the mere question of delay or expense. There must be something in the nature of the action or proceeding that makes it apparent to this court that it will not be able to protect the rights of the litigants or afford them adequate redress, otherwise than through the exercise of this extraordinary jurisdiction.

We desire to say in conclusion that the court is declaring no new rule at this time. The rule now adhered to has been the established one in this court since the decision in *State ex rel. Townsend Gas. etc. Co. v. Superior Court*, *supra*, and ever since the announcement of that decision the court has uniformly treated the cases cited by the relator as overruled. To avoid further misunderstanding, the cases of *State ex rel. Cummings v. Superior Court*; *State ex rel. Campbell v. Superior Court*; *State ex rel. Allen v. Superior Court*; and *State ex rel. Stockman v. Superior Court*, *supra*, and all other decisions of this court which make the question of the jurisdiction of the court below the sole test of jurisdiction in this court, on applications of this kind, are hereby overruled. The application for the writ is denied.

MOUNT, C. J., FULLERTON, HADLEY, DUNBAR, ROOT, and CROW, JJ., concur.

[No. 5741. Decided November 25, 1905.]

THE STATE OF WASHINGTON, *on the Relation of W. S. Grass et al., Appellant, v. S. C. White, as Justice of the Peace, et al., Respondents.*¹

APPEAL—BONDS—CONSTRUCTION—APPEAL OR SUPERSEDEAS—SUFFICIENCY—DISMISSAL. An appeal from a judgment forfeiting a bail bond, which could not be, and was not attempted to be, superseded, will not be dismissed because the bond on appeal in the sum of \$200 contained language making it in form an appeal and supersedeas bond.

EXTRADITION—ARREST—WARRANT—GROUNDS AND PREREQUISITES FOR ISSUANCE—STATUTE—CONSTRUCTION—COMPLAINT—SUFFICIENCY. Bal. Code, § 7017, providing for the arrest and detention of a person charged with crime in another state, upon demand of the executive of such state, and upon complaint under oath setting forth the offense, requires a legal charge of crime made in the state having jurisdiction of the offense; and a person cannot be arrested and held in this state upon an unauthenticated warrant from another state and a complaint filed in a court of this state reciting that the party is a fugitive from justice.

BAIL—UPON UNLAWFUL ARREST—CASH DEPOSIT—FORFEITURE—TITLE. Where a party is arrested without authority of law, or any legal charge made against him, and is entitled to his discharge as a matter of right, a cash deposit in lieu of bail is an involuntary act and without consideration and the magistrate having obtained possession of the money unlawfully, neither he nor the public authorities can retain it as against the party making the deposit.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered March 27, 1905, dismissing on the merits a petition for a writ of certiorari to review a judgment of a justice of the peace, forfeiting bail money deposited in lieu of a bail bond in extradition proceedings, upon failure of the accused to appear. Reversed.

W. W. Langhorne and Forney & Ponder, for appellant.

J. R. Buxton, A. J. Falknor and Reynolds & Stewart, for respondents.

¹Reported in 82 Pac. 907.

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Opinion Per Root, J.

Root, J.—This is an appeal from a judgment dismissing a petition for a writ of certiorari, and affirming a judgment of forfeiture rendered by a justice of the peace in a proceeding on behalf of the state against one Daniel Grass, preliminary to extradition. The facts involved were about as follows: The sheriff of Lewis county received a letter couched in the following language:

“Mr. W. H. Urquhart, Chehalis, Wash.

“Dear Sir:—Enclosed please find warrant for Daniel Grass, which will enable you to file a complaint and have a fugitive warrant issued, on which you can arrest him and hold him until I can come and get him. As soon as you arrest him wire me and I will come with necessary papers. Hoping you will succeed, I remain yours, Frank Deist.”

The “warrant” referred to in said letter purported to be a warrant issued by one G. W. Hendricks, a justice of the peace of Labette county, in the state of Kansas. Neither the warrant nor the signature thereto was certified or in any manner authenticated. The document recited that a complaint had been made before said justice charging said Grass with a certain felony. Upon receiving this letter with said purported warrant inclosed, the sheriff of Lewis county filed a complaint with S. C. White, one of the justices of the peace in and for said county, and said magistrate thereupon issued a warrant for the apprehension of said Grass as a fugitive from justice, and the latter was by the sheriff arrested and brought before said court. The complaint filed by the sheriff and upon which the warrant was issued did not recite that any indictment, information, or complaint of any kind had ever been made, filed, or entered against said Grass in the state of Kansas, or that said Grass was in any manner charged with any crime in said state. When Grass was brought before Justice White, the hearing was continued until a future date, and his bail bond was fixed in the sum of \$1,500. In lieu of this bail bond, a cash deposit was made by W. S. Grass,

the father of said Daniel Grass, and the latter was thereupon admitted to liberty, the condition of the deposit being that he should appear at the time and place to which the hearing had been adjourned. On the day to which the hearing had been continued, said Daniel Grass failed to appear, and thereupon the justice proceeded to and did declare said bail money forfeited. These relators thereafter, in the superior court, sued out a writ of review or certiorari to said Justice White, and sought to have the action of said justice in declaring a forfeiture of said bail money set aside and held for naught. From a judgment denying relators relief, this appeal is taken.

A motion is made to dismiss the appeal, for the reason that the appeal bond, being only in the sum of \$200, contains language making it in form an appeal and supersedeas bond. The bond is entitled "appeal bond," and it is evident that its purpose was solely to perform the functions of an appeal bond. It was never used, or sought to be used, as a supersedeas. This is not an appeal from a money judgment, nor is there anything in the order or judgment of the superior court that could be superseded. It should not be the practice of an appellate court to dismiss appeals for technical reasons unless such course be imperative under the requirements of the statute. In the case of *Westland Pub. Co. v. Royal*, 36 Wash. 399, 78 Pac. 1096, in discussing a motion to dismiss an appeal, this court spoke as follows:

"It is not the policy of our law to deprive a litigant, upon merely technical grounds, of the right to have his cause tried and determined upon its merits."

The motion to dismiss the appeal is overruled.

Upon the merits, it is urged by appellants that there was no authority for requiring a bail bond, and consequently no consideration for the deposit of the bail money which was made in lieu of such bond. This contention is made upon the ground that the complaint sworn to by the sheriff before Justice White was fatally defective for the reason that it

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did not allege that Grass had been charged in another state with a crime. Bal. Code, § 7017, provides how a fugitive may be complained against and arrested in this state. It says:

“Whenever any person shall be found within this state charged with an offense committed in any state or territory, and liable by the constitution and laws of the United States to be delivered on the demand of the executive of such state or territory, any court or magistrate authorized to issue warrants in criminal cases may, upon complaint under oath setting forth the offense, and such other matters as are necessary to bring the offense within the provisions of law, issue a warrant to bring the person so charged before the same or some other court or magistrate so authorized within the state, to answer such complaint as in other cases.”

Section 7018 provides for the examination of such arrested person, and points out how he may be required to recognize to appear before the court or magistrate at a future day. It is also contended by appellants that the justice had no authority of law to accept cash bail in a proceeding of this kind instead of the bond mentioned in the statute. Other objections are also urged; but in view of our conclusion upon the first proposition mentioned, it will be unnecessary to discuss any other.

It would seem, from a reading of the statute and from an examination of the authorities bearing upon procedure of this kind, that the warrant for the apprehension in this state of a fugitive from another state must be based upon a complaint showing that said person is under a legal charge of crime in such other state. A complaint made and filed in this state charging a person here with having committed a crime in another state is not a legal charge of crime as that expression is commonly understood in criminal jurisprudence. A legal charge of crime, as contemplated in our extradition statutes, means one made in that state having jurisdiction to try the offense, and from which the fugitive has fled. Hence, it follows that the complaint made before justice of the peace

White was insufficient to justify the issuance of a warrant, or to in any manner authorize the apprehension or detention of said Grass. Such restraint being without justification, the justice could not legally demand of him a bond or a cash deposit as a prerequisite to his release. He was entitled to his liberty as a matter of right, and was not called upon by the law to furnish any recognizance. Being, however, restrained from exercising this right except upon condition of his furnishing a bond or cash bail, the deposit of said bail money was an involuntary act on his part or in his behalf. The justice having obtained possession of such money without authority of law, neither he nor the county nor the state acquired any title therein, or right of possession, as against relators, thereto. The title and right to possession of this money remained in the party who deposited it.

In the case of *In re Foye*, 21 Wash. 250, 57 Pac. 825, this court, speaking by Anders, J., with reference to the authority requisite to extradite a fugitive from justice, employed this language:

“It will be observed that there are three things requisite in order to authorize the executive authority of a state to extradite a fugitive from justice, and they are these: First, the accused must be demanded as a fugitive from justice by the executive of the state from which he fled; second, such demand must be accompanied by a copy of an indictment found, or an affidavit made, before a magistrate charging the fugitive with having committed a crime in the demanding state; and third, such copy of the indictment or affidavit must be certified by the executive of the demanding state to be authentic. An extradition warrant, in order to be valid, should show upon its face a compliance with these requisites and necessary conditions.”

In the case of *Smith v. State*, 21 Neb. 552, 32 N. W. 594, the supreme court of Nebraska, in passing upon a statute similar to ours, said:

“The word ‘charged’ in the statute contemplates that the person arrested and delivered up committed the offense in

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another state and is in such state charged, either by indictment, information, or accusation known to the law of such state before some court, magistrate, or officer thereof."

See, also, *Ex parte Hart*, 63 Fed. 249; *Commonwealth v. Dennison*, 24 How. 66, 16 L. Ed. 717; *Forbes v. Hicks*, 27 Neb. 111, 42 N. W. 898; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *Ex parte Lorraine*, 16 Nev. 63; *Matter of Leland*, 7 Abb. Pr. (N.S.) 64; *State v. Hufford*, 28 Iowa 391; *Kurtz v. State*, 22 Fla. 36, 1 Am. St. 173. In the case of *State v. Swope*, 72 Mo. 399, the supreme court of Missouri, in a case similar to the one at bar, said:

"If, as we have seen, the justice had no jurisdiction to issue the warrant, nor to take the recognizance, or what amounts to the same thing, no jurisdiction affirmatively appears on the face of his proceedings, the giving of the recognizance could not be regarded as voluntary, nor as conferring a jurisdiction not previously possessed. *State v. Hufford*, 28 Iowa 391; *U. S. v. Horton's Sureties*, 2 Dill. 94."

See, also, *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170.

The judgment of the honorable superior court is reversed, and the cause remanded, with instructions to enter a judgment and decree holding for naught the action of the justice of the peace in declaring said bail money forfeited.

MOUNT, C. J., CROW, DUNBAR, RUDKIN, and HADLEY, JJ.,
concur.

[No. 5702. Decided November 25, 1905.]

EVERETT PRODUCE COMPANY, *Appellant*, v. SMITH
BROTHERS, *Defendants*, A. C. GOERIG,
Garnishee, Respondent.¹

JUDGMENTS—SETTING ASIDE DEFAULT—DISCRETION. The vacation of a default judgment will not be reversed on appeal except for abuse of discretion.

FRAUDULENT CONVEYANCES—SALES—STOCK OF GOODS IN BULK—LIVERY STABLE—STATUTE—CONSTRUCTION. The sales in bulk act requiring the purchaser of any stock of goods, wares or merchandise in bulk to demand a list of the vendor's creditors and see to the application of the proceeds of the sale, does not apply to the sale of the horses, harness, carriages, and all the property in a livery stable; since the act applies only to goods kept for sale.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered February 8, 1905, upon findings in favor of a garnishee, after a trial on the merits before the court without a jury, dismissing a garnishment proceeding. Affirmed.

William Sheller, for appellant.

Bell & Austin, for respondent.

DUNBAR, J.—On the 12th day of May, 1903, the appellant recovered judgment in the superior court of Snohomish county against the defendants Smith Brothers, for the sum of \$449. On the same day it made affidavit for a writ of garnishment against A. C. Goerig, the respondent garnishee in this case. Goerig failed to make any appearance or answer to the writ; default was taken, and judgment rendered against him on the 4th day of June, 1903. On the 16th day of June, 1903, the garnishee respondent served upon appellant a notice of hearing, a motion to set aside the judgment obtained against him, and an affidavit in support of said motion. On the 27th

¹ Reported in 82 Pac. 905.

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Opinion Per DUNBAR, J.

day of June, 1903, the court vacated the judgment against the garnishee, and on the 30th day of June, his answer as garnishee in the aforesaid matter was filed.

Upon the trial the court found, among other things which are irrelevant to this investigation, that during the year 1902 Smith Brothers, the above-named defendant, owned and operated a livery, feed, and boarding stable in the city of Everett, Washington, and became indebted to the plaintiff, appellant here in the sum of \$432.49, for goods, wares, and merchandise sold and furnished to said Smith Brothers and used in running and operating said livery barn, and thereafter the said plaintiff procured a judgment for said sum against the said Smith Brothers, who at the time of the procurement of said judgment were insolvent and unable to pay the same; that on or about the 12th day of December, 1902, Goerig loaned to the said Smith Brothers the sum of \$290; that at said date there was a chattel mortgage upon all the property owned and used by the said Smith Brothers for the sum of \$362.50, which was a first and valid lien upon said property; that, on or about the 6th day of January, 1903, said Smith Brothers, being unable to pay said Goerig the said sum of \$290 and to discharge the said chattel mortgage of \$362.50, made a bill of sale of all of said livery stock and property to the said Goerig for the consideration of the said \$290 theretofore loaned to the said Smith Brothers by Goerig, and his assumption and agreement to pay the said chattel mortgage of \$362.50, and the interest thereon; and, under and by virtue of said bill of sale, the said Goerig took possession and became the owner of said livery barn and stock; that, after the execution of said bill of sale to Smith Brothers, the plaintiff caused a writ of garnishment to be issued by virtue of said judgment, in their favor and against Smith Brothers, and caused the said Goerig to be garnished, and that issues were made upon said garnishment and this trial had; that said property so turned over to said Goerig was of no greater value than \$700; that Goerig, at the time of receiving the said bill

of sale from Smith Brothers, did not cause the said Smith Brothers, or either of them, to make an affidavit as to the names of, and the amounts due, their creditors, as provided by Laws 1901, p. 222.

As conclusions of law, the court found that the respondent Goerig was entitled to be dismissed out of the action, (1) because he was not a purchaser of the business of Smith Brothers within the sales-in-bulk law; (2) because he was at the time of the giving of the bill of sale a mere creditor of the said firm of Smith Brothers; and that the garnishee defendant was entitled to a judgment for his costs in this action. Certain findings of fact and conclusions of law were proposed by the appellant which the court refused to find. From this judgment this appeal is taken.

The first error assigned is that the court erred in ordering a directed judgment rendered against the garnishee to be vacated and set aside. Without reviewing the showing made by the garnishee defendant in this case, we are satisfied that the court acted well within its discretion in vacating the judgment. We are also satisfied from a perusal of the record that no error was committed by the court in finding that the property turned over to respondent was of no greater value than \$700. This leaves for discussion only the principal contention of whether or not the bill of sale taken by the garnishee defendant Goerig is void under the provisions of chapter 109 of the laws of 1901, an act to regulate the purchase, sale, transfer, and incumbrance of stocks of goods, wares, and merchandise in bulk, and prescribing penalties for the violation thereof. Section 1, page 222, of said law provides that,

"It shall be the duty of every person who shall bargain for, or purchase any stock of goods, wares or merchandise in bulk, for cash, or on credit, before paying to the vendor, or his agent, or representative, or delivering to the vendor, or his agent, any part of the purchase price thereof, or any promissory note, or other evidence therefor, to demand of and receive from such vendor, or agent, or if the vendor or agent be a corporation, then from the president, vice-president, secre-

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tary or managing agent of such corporation, a written statement, sworn to [in form afterwards prescribed] of the names and addresses of all the creditors of said vendor, to whom said vendor may be indebted, together with the amount of the indebtedness due or owing, and to become due or owing, by said vendor to each of such creditors; and it shall be the duty of said vendor, or agent, to furnish such statement, which shall be verified by an oath”

Section 2 further provides that, in case such statement under oath is not required and taken, the transfer shall be fraudulent and void. The transfer in this case was of horses, wagons, and harness, which comprised the stock in the livery stable.

The construction of this statute has been before this court frequently, and it is insisted by the appellant here that this cause falls within the decision of this court in *Plass v. Morgan*, 36 Wash. 160, 78 Pac. 784. In that case it was held that the buying of all the goods, wares, and merchandise in a restaurant was a purchase, within the contemplation of the statute just above quoted. It may be a little difficult to distinguish that case from the case at bar, and yet we think that there is in reality a distinction, and that the goods, wares, and merchandise necessarily used by a restaurant keeper can more appropriately be termed a “stock of merchandise,” than the horses and carriages in a livery stable. It is true that a restaurant keeper, when he buys a ton of flour, does not buy it for the purpose of selling the article again in the same condition that it was in when he bought it, as does the ordinary merchant; but he does dispose of the same goods in a changed condition, and it is a business which from necessity calls for constant and continued purchases from wholesale dealers. While, on the other hand, there is no sale of horses or carriages contemplated at all in the conducting of a livery business, and the stock, when once obtained, outside of the feed required for feeding the horses, is less mutable. In any event, we do not see our way clear to extend the doctrine

announced in *Plass v. Morgan*, which we think would have to be done to maintain appellant's theory in this case.

In a subsequent case, however, viz., *Albrecht v. Cudihee*, 37 Wash. 206, 79 Pac. 628, the decision announced, it seems to us, clearly covers the case at bar. There it was contended that a cash register kept by Harkins & Webb, saloon keepers, which was levied upon while in the possession of the purchasers of said business, was property which fell within the provisions of the law in relation to sales-in-bulk, and that the sale of the said cash register was void by reason of the failure of the purchasers to require the affidavit provided by the law; and this court held that the cash register was not a part of the stock of goods, wares, or merchandise in the saloon; citing *Van Patten & Marks v. Leonard*, 55 Iowa 520, and *Kent v. Liverpool etc. Ins. Co.*, 26 Ind. 294, 89 Am. Dec. 463. It is insisted by the appellant that that case is not in point for the reason that it was decided on stipulated facts and on different procedure, and that it can be gathered that had the garnishment procedure been used the case would have been decided differently. We think there is nothing in this assertion, for the same rules of construction would be applied to the statute whether the questions arose under a garnishment proceeding or under an attachment, or a levy on execution. As to the stipulation, that was only as to the value of the cash register, that it was used in making up and keeping the cash of the concern, and that it was not a part of the goods, wares, and merchandise kept for sale in the saloon. There is no contention in this case that the property sold to the respondent was kept for sale. So that the stipulated facts in that case do not in any way affect the decision of the court. We think, under the law as announced in that case and to which we feel constrained to adhere, that no error was committed by the court in the conclusions reached.

The judgment is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, RUDKIN, ROOT, and CROW, JJ., concur.

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Opinion Per HADLEY, J.

[No. 5789. Decided November 25, 1905.]

A. G. BOYD, *Appellant*, v. AMERICAN SAVINGS BANK AND
TRUST COMPANY, *Respondent*.

ESCROWS—CERTIFICATE OF STOCK—DELIVERY UPON STIPULATED PAYMENTS—ACTION BY VENDOR FOR POSSESSION—NON-PERFORMANCE BY VENDEE—EVIDENCE—DIRECTING VERDICT FOR DEFENDANT. Where stock was delivered to a bank in escrow to be delivered to a purchaser upon the payment of \$2,000 in certain monthly installments, a finding of a substantial compliance with the contract upon the part of the purchaser is sustained by the evidence, where it appears that it was arranged that, during the owner's absence from the state, he should draw on the bank for the amounts due, that \$1,000 was deposited to his credit in monthly installments practically as agreed upon, before he returned, at which time \$300 was past due, and he was informed that the purchaser had been waiting for him to draw when the funds would be ready; that the day after his return the \$300 was deposited before any demand was made by him, and at the time of his demand for the stock, three or four days later, nothing was due on the contract; and in an action by him to recover the stock, a verdict is properly directed for the defendant.

Appeal from a judgment of the superior court for King county, Poindexter, J., entered May 19, 1905, upon the verdict of a jury rendered in favor of the defendant by direction of the court, after a trial on the merits, in an action against the holder to recover possession of a certificate of stock placed in escrow. Affirmed.

Aust & Terhune, for appellant.

Roberts & Leehey and *L. V. Ray*, for respondent.

HADLEY, J.—This action was brought to recover the possession of a certain certificate of stock, or the value thereof if delivery cannot be had. The certificate calls for one hundred and fifteen shares of the capital stock of the Seattle Iron & Wire Works, a corporation, and it is stipulated in writing between the parties that, for all the purposes of this

¹Reported in 82 Pac. 904.

suit, the stock shall be deemed to be of the value of \$2,000. The complaint alleges that the plaintiff is the owner and entitled to the possession of the stock, and that it is unlawfully withheld by the defendant. The answer is a general denial. The cause came on for trial before a jury, and at the conclusion of the testimony, a motion by the defendant for a directed verdict in its favor was granted. A similar motion made by the plaintiff was denied. A verdict for the defendant was returned and judgment was entered thereon to the effect that, at the beginning of this suit, the defendant was rightfully in the possession of the certificate of stock; that the plaintiff was not entitled thereto, and that the defendant shall recover costs. The plaintiff has appealed.

The material facts shown in evidence were about as follows: On or about the 4th day of May, 1904, the appellant, as owner of said stock, entered into an agreement with one Briscoe, pursuant to which the two deposited the certificate with the respondent upon the following written terms:

“ESCROW MEMORANDUM.

“Seattle, Wash., May 2nd, 1904.

“The attached certificate of stock for one hundred and fifteen (115) shares of the Seattle Iron and Wire Works is deposited with the American Savings Bank & Trust Co., subject to the following conditions: The stock is the property of A. G. Boyd and is deposited by him to be delivered to S. C. Briscoe or order upon said S. C. Briscoe paying therefor two thousand (\$2,000) dollars in the following manner and on or before the following dates, to wit: The sum of \$100.00 paid upon depositing the stock this date. The sum of \$200.00 to be paid May 23rd, 1904. The sum of \$200.00 to be paid June 23rd, 1904. The sum of \$100.00 to be paid July 23rd, 1904, and on the 23rd of each succeeding month thereafter the sum of \$100.00 until the whole purchase price is paid. In case of failure to make any payment the American Savings Bank & Trust Co. is instructed hereby to deliver the stock to said A. G. Boyd or his order. In case all payments are made then said American Savings Bank and Trust Co. is instructed to deliver said stock to said S. C. Briscoe. All pay-

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ments referred to are to be made at the American Savings Bank and Trust Co.”

Respondent on the same day accepted the possession of the certificate, with the above memorandum of agreement attached thereto. The one hundred-dollar cash payment made on that day was, at appellant’s request, placed to the latter’s credit in the respondent bank, and it was understood that subsequent payments should be likewise credited. Soon after this time, appellant was making arrangements to go to San Francisco, where he expected to remain for some time. Prior to going away, he consulted with respondent’s manager about the best manner to draw for this money while he was away. The manager told him to draw checks upon his account with respondent through the latter’s San Francisco banking correspondent. This was accordingly done while appellant was in San Francisco. It will be noticed from the foregoing quoted memorandum of agreement, that the sum of \$200 was to be paid on the 23d day of May, a like sum on the 23d day of June, and \$100 on the 23d day of each succeeding month. The following sums were by respondent placed to the credit of appellant’s account:

“May 4th	\$100.00
May 25th	200.00
June 24th	200.00
July 29th	100.00
Sept. 26th	100.00
— — —	100.00
Oct. 24th	100.00
Nov. 23d	100.00”

It will be seen that the credits, and the several amounts thereof, correspond with the number of months, and the amounts to be paid in those months, inclusive of the month of November. There is some discrepancy between the dates of some of the deposits and the dates for payment named in the contract; but it does not appear when the payments were actually made “at the American Savings Bank and Trust

Co.," as provided in the contract. The dates shown relate only to the time when the several sums were placed to the credit of appellant's account in the bank. No sum was by respondent placed to the credit of appellant's account during the succeeding months of December and January. In the month of February appellant returned from San Francisco. On the 28th day of the latter month he called, early in the day, at respondent's bank, and had his passbook balanced. The balance shown was with reference to the close of business on the day before, and no deposits therefore appeared for the months of December and January. On the same day a payment of \$300, by check to appellant or bearer, was, by the assignee of the contract, handed to the bank, and by the latter placed to the credit of appellant's account. The said amount made the aggregate sum of the credits, the full amount due under the contract up to that time. During appellant's absence he had drawn all that had been previously credited to his account, except \$128, and at the time he called at the bank he was told by the bank officers that the assignee of the contract was waiting until appellant should draw when the amount would be placed to his credit. He at that time presented no check, asked for no money, and made no demand for the certificate of stock. A few days afterwards, on the 4th day of March, he went to the bank and demanded possession of the certificate of stock, which was refused.

Did the court err in instructing a verdict for respondent? The remarks of the trial court, appearing in the record, indicate that he believed there was a substantial compliance with the contract, in that it was understood that appellant would from time to time draw upon respondent for this money during his absence, and that the money would be ready to meet such demands. The manager of the bank testified that the assignee of Briscoe had arranged with the bank to meet the payments for him. The court held that the bank thereby became his agent to make the payments, if he should overlook them, and the manager also testified that appellant agreed that

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he would draw upon the bank for these payments, and also that such drafts would have been paid. It is certain that no demand was ever made of the bank as escrow holder for money due or arising from this contract when it was not forthcoming, and we believe the court was right in holding that there was such a substantial compliance as prevented a forfeiture. \$1,300 on a contract calling for a total of \$2,000 had been paid and credited to appellant's account before he demanded possession of the stock, and not another dollar was then due. Respondent was a mere escrow holder and, in view of the payments made, the contract left with it showed that, when demand for possession of the stock was made, nothing was then due. Under such circumstances respondent should not have yielded possession of the stock.

We think the court did not err in its instruction, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, DUNBAR, ROOT, and CROW, JJ., concur.

[No. 5552. Decided November 27, 1905.]

H. L. TATUM *et al.*, Appellants, v. W. A. GEIST *et al.*, Defendants, NIAGARA FIRE INSURANCE COMPANY *et al.*, Respondents.¹

APPEAL—DECISIONS REVIEWABLE—GARNISHMENT. A garnishment, while ancillary to the main cause, is a "proceeding" within the meaning of the statute regulating appeals to the supreme court.

SAME—ORDER QUASHING SUMMONS. An order quashing the service of a summons is appealable, when it in effect determines the action and prevents a final judgment.

SAME—GARNISHMENT—QUASHING SERVICE OF WRIT. As a garnishment proceeding only affects the indebtedness due from the garnishee at the time of the service of the writ, an order quashing the service of a writ of garnishment releases all such indebtedness and effects,

¹Reported in 82 Pac. 902.

and in effect determines that particular proceeding and prevents any judgment whatever therein, since a second writ is an independent proceeding attaching to a different subject-matter; hence an order quashing a writ of garnishment is appealable as a final determination of the proceeding.

APPEAL—NOTICE—SECOND APPEAL. The pendency of an appeal, ineffectual because of the failure to file a bond, is not a bar to a second appeal in the same cause.

Motion to dismiss an appeal from an order of the superior court for Clallam county, Hatch, J., entered January 9, 1905, vacating a default judgment against garnishees, and quashing the service of the writ of garnishment. Denied.

Shank & Smith, for appellants.

Trumbull & Trumbull, for respondents.

RUDKIN, J.—On the 28th day of September, 1904, a writ of garnishment issued out of the court below in a certain action therein pending, wherein Tatum & Bowen were plaintiffs and W. A. Geist and others were defendants, against the Niagara Fire Insurance Company of the city of New York, the London Assurance Corporation, and others. On the same day, the writ was served on the Niagara and London companies, the service being made on a resident agent of said companies, authorized to solicit insurance in their behalf. On the 21st day of October, 1904, a default judgment was entered against said companies, in favor of the plaintiffs in the principal action, for the sum of \$1,150, with interest and costs. On the 9th day of January, 1905, the court vacated this judgment and quashed the service of the writ of garnishment, for the reason that service on an agent authorized to solicit insurance did not confer jurisdiction over the garnishee companies.

On the 2d day of February, 1905, the plaintiffs in the principal action served a written notice of appeal from the order vacating the judgment and quashing the service of the writ of garnishment, but through some inadvertence the no-

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tice, the proof of service thereof, and a bond to render the appeal effectual were not filed until the 8th day of February, 1905, or until six days after the service of the notice. On the 24th day of February, 1905, the plaintiffs gave a second notice of appeal and filed the notice, together with the proof of service thereof and an appeal bond, within the time required by law. The respondents now move to dismiss the second appeal, on the following grounds: (1) Because the order is not appealable; (2) because the appeal was not taken within the time limited by law; and (3) because a motion to dismiss the first appeal was pending in this court at the time the second appeal was taken.

While a garnishment is ancillary to the main action, it is nevertheless a proceeding within the meaning of the statute regulating appeals to this court. Thus, in *Campbell v. Simpkins*, 10 Wash. 160, 38 Pac. 1039; *Smith v. Collen*, 18 Wash. 398, 51 Pac. 1040; *Russell v. Millett*, 20 Wash. 212, 55 Pac. 44; *Gaffney v. Megrath*, 23 Wash. 476, 63 Pac. 250; and numerous other cases that might be cited, this court entertained appeals from judgments in garnishment proceedings, irrespective of an appeal from the judgment in the principal action. The statute provides that an appeal lies to this court from any order affecting a substantial right in a civil action or proceeding which either in effect determines the action or proceeding and prevents a final judgment therein, or discontinues the action, and from a final order made after judgment which affects a substantial right. Bal. Code, § 6500.

The right to appeal from an order vacating a judgment has been the subject of more or less controversy ever since the organization of this court. The decisions are reviewed at length in the majority and dissenting opinions in *Nelson v. Denny*, 26 Wash. 327, 67 Pac. 78. Since that decision it has been held, in *Metler v. Metler*, 28 Wash. 734, 69 Pac. 9; *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043; *Post v. Spokane*, 35 Wash. 114, 76 Pac. 510; and perhaps other

cases, that an order vacating a judgment is not appealable. On the other hand, it was held in *Embree v. McLennan*, 18 Wash. 651, 52 Pac. 241; *Deming Inv. Co. v. Ely*, 21 Wash. 102, 57 Pac. 353; *Wagnitz v. Ritter*, 31 Wash. 343, 71 Pac. 1035; and *Nolan v. Arnot*, 36 Wash. 101, 78 Pac. 463, that an order quashing a summons or the service thereof, or vacating a judgment which in effect determines the action or proceeding and prevents a final judgment therein, is appealable.

The rule deducible from these decisions is this: If an order vacating a judgment, or quashing a summons or the service thereof, is or may be followed by further proceedings in the cause, and the entry of a final judgment therein, such order may be reviewed on appeal from the final judgment, and is not itself appealable. If, on the contrary, the order vacating the judgment, or quashing the summons or the service thereof, in effect determines the action or proceeding and prevents a final judgment therein, the order itself is a final one, and is therefore appealable. Within this rule, an order vacating a judgment in a garnishment proceeding, which does not determine the proceeding and prevent a final judgment therein is not appealable.

What is the effect of quashing the service of a writ of garnishment? A decision of this question involves a brief consideration of the purpose of the garnishment and the effect of the service of the writ. Bal. Code, § 5393, provides that the writ shall command the garnishee to appear and answer under oath "what, if anything, he is indebted to the defendant, and was when such writ was served, and what personal property or effects, if any, of the defendant he has in his possession or under his control, or had when such writ was served." Section 5395 prescribes the form of the writ in substantially the same language. Section 5398 provides that it shall not be lawful for the garnishee to pay to the defendant any debt, or to deliver to him any effects after the service of the writ. Section 5401 provides that, in case the garnishee makes default, it shall be lawful for the court to

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render judgment against him for the full amount claimed by the plaintiff, against the defendant, or in case the plaintiff has a judgment against the defendant, for the full amount of such judgment, with all accruing interest and costs. Section 5402 provides that, if it appears from the answer of the garnishee, or otherwise, that the garnishee is indebted to the defendant, or was so indebted when the writ was served, judgment shall be entered in favor of the plaintiff and against the garnishee for the amount of such indebtedness.

It will thus be seen that the garnishment only affects the indebtedness due from the garnishee to the defendant at the time of the service of the writ, or at any time thereafter until final judgment in the garnishment proceeding, or effects in the hands of the garnishee belonging to the defendant between said dates. An order quashing the service of the writ of garnishment not only releases all such indebtedness and effects, but in effect determines that particular proceeding and prevents a final judgment or any judgment whatever therein. If we concede that a second writ may issue on the same affidavit, yet the second writ will only have the same operation as the first, viz., to bring within the jurisdiction of the court, indebtedness due from the garnishee to the defendant, or effects in the hands of the garnishee belonging to the defendant, at the time of the service of the second writ, or thereafter until final judgment on the second writ. In other words, the proceedings under the second writ are to all intents and purposes independent of the proceedings under the first. There is a different subject-matter and different issues. True, the judgment on the first writ would be *res adjudicata* as to all issues there determined, but it would have no other or further effect. We are therefore of opinion that an order quashing the service of a writ of garnishment is, in effect, a final determination of that proceeding, and prevents a final judgment therein. Such an order is appealable and, being a final order, the appeal in this case was taken within the time limited by law.

The first appeal was ineffectual by reason of the failure to file the bond on appeal within the time required by law. The pendency of such an appeal is no bar to a second appeal in the same cause. Bal. Code, § 6519; *Embree v. McLennan*, *supra*; *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16, 54 Pac. 763; *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571; *Noble v. Whitten*, 34 Wash. 507, 76 Pac. 95.

The motion to dismiss the appeal is therefore denied.

MOUNT, C. J., ROOT, DUNBAR, HADLEY, CROW, and FULLERTON, JJ., concur.

[No. 5703. Decided November 27, 1905.]

A. W. THORNLEY *et al.*, Appellants, v. JULIA L. ANDREWS *et al.*, Respondents.¹

APPEAL—STATEMENT OF FACTS—ATTACHING EXHIBITS AND DEPOSITIONS AT TIME OF SETTLEMENT. Exhibits appropriately referred to in the statement of facts, and part of the records on file, need not be attached to the statement at the time it is served, but it is sufficient if they are attached at the time the statement is certified; and a statement to the effect that they were received in evidence is an appropriate reference thereto.

LIMITATION OF ACTIONS—ADVERSE POSSESSION—GRANTEE OF MORTGAGOR HOLDING ADVERSARY TO MORTGAGEE—WHEN RIGHT ACCRUES. Where the owner of three lots, after mortgaging one lot in 1890, sold the other two lots, pointing out the supposed boundary line as indicated by stakes, which in fact included a two and one-half foot strip of the mortgaged lot, and such strip was taken possession of and adversely held by the purchasers for a period of more than ten years, and meanwhile the mortgage was foreclosed without making the purchasers parties to the action, and the right of action for the foreclosure of the mortgage was subsequently barred by lapse of time as to the purchasers in possession of the strip, their title to the strip by virtue of adverse possession is complete; since the statute begins to run as against the mortgagors and their successors at the date of the taking of possession, and is complete in ten years, and as against the mortgagee and his successors in interest, it begins to run at the date the mortgage is due (no payments being made) and is complete in six years.

¹Reported in 82 Pac. 899.

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Appeal from a judgment of the superior court for Pierce county, Huston, J., entered October 27, 1904, upon the verdict of a jury rendered in favor of the defendants, after a trial on the merits, in an action of ejectment. Reversed.

Ira A. Town, for appellants.

Thomas D. Hitchcock and *Emmett N. Parker*, for respondents.

MOUNT, C. J.—This action was brought by appellants, to recover from respondents a strip of land about two and one-half feet wide along the north side of lot 8, in block 12, Catlin's addition to Tacoma. The appellants in their complaint alleged, that they are the owners of said strip of land by reason of adverse possession for a period of more than ten years prior to July 15, 1903; that on said date the respondents wrongfully and by force dispossessed the appellants of said strip of land to the damage of appellants in the sum of \$400. Respondents denied these allegations of the complaint, and alleged ownership in themselves. On these issues the cause was tried to the court and a jury. A verdict was rendered in favor of respondents. Appellants prosecute this appeal from a judgment rendered on the verdict.

At the time the proposed statement of facts on appeal was filed and served upon respondents' attorneys, it contained none of the exhibits or depositions in the case. At the time the statement of facts was settled, the court, at the request of appellants and over the objections of respondents, attached to the statement all the exhibits and depositions in the case, and thereupon certified the statement of facts as containing all the facts. Respondents now move to strike all the exhibits and the depositions which were not attached to the proposed statement of facts at the time it was served, for the reason that respondents had no notice that appellants would ask the court to attach such exhibits or depositions to the statement of facts. An examination of the proposed statement of facts

which was served upon respondents discloses that all the exhibits and depositions which were attached to the statement when it was certified were referred to therein as having been offered and received in evidence and filed in the cause. It was not necessary for the appellants to attach to the proposed statement of facts copies of the exhibits or depositions which were already a part of the record, for the statute, at Bal. Code, § 5059, expressly provides that,

“Depositions and other written evidence on file shall be appropriately referred to in the proposed bill or statement, and when it is certified the same or copies thereof, if the judge so direct, shall be attached to the bill or statement and shall thereupon become a part thereof.”

It was only necessary, therefore, for the proposed statement to appropriately refer to such depositions or exhibits. A statement in a proposed statement of facts, to the effect that a certain exhibit or deposition was offered and received in evidence, would be an appropriate reference thereto. *Suksdorf v. Humphrey*, 36 Wash. 1, 77 Pac. 1071; *O'Neile v. Ternes*, 32 Wash. 528, 73 Pac. 692. There is no merit in the motion, and it is therefore denied.

Upon the trial of the cause, it appeared that lots 7, 8, and 9 of block 12, Catlin's addition to Tacoma, are adjoining lots, lying side by side. Lot 7 is to the north of lot 8, lot 8 is north of lot 9. In the year 1890 all of these lots were owned by R. F. Wells and wife. At that time Wells and wife built two houses upon the lots; one house was built on lots 8 and 9, and the other house was built upon lot 7. In August, 1890, Wells and wife, gave a mortgage upon lot 7 to secure a promissory note due August 23, 1893. On November 11, 1890, Wells and wife sold lots 8 and 9 to appellants, who took immediate possession thereof. At the time of the sale of lots 8 and 9 by Wells to appellants, the lines of the lots were pointed out as running to certain stakes then existing in the ground. Appellants took possession of all the ground pointed out to them as belonging to lots 8 and 9, which ground

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included the strip of lot 7 now in dispute. They planted a hedge fence along the line which was pointed out as the line between lots 7 and 8, and continually thereafter until July, 1903, cultivated said strip in lawn, trees, and shrubs.

On November 12, 1890, Wells and wife sold lot 7 to Henry Young and wife, subject to the mortgage above named. In 1895 the mortgage given by Wells and wife was foreclosed against the mortgagors and Young and wife. Appellants, who were at that time in the actual possession of the strip of land in dispute, were not made parties to the foreclosure. In June, 1901, respondents acquired the title obtained on foreclosure, and entered into possession of lot 7 except the strip in dispute. Up to July, 1903, the mortgagors and their grantors Young and wife and these respondents acquiesced in the possession held by the appellants. In that month, however, respondents had lot 7 surveyed, when it was discovered that appellants were occupying a strip thereof about two and one-half feet wide along the south side of said lot. Respondents thereupon evicted appellants from said strip, and built a fence upon what they claim is the true line between lots 7 and 8. Appellants thereupon brought this action.

The pertinent question in the case is, did the period of adverse possession begin to run in favor of appellants from the time they took possession of the strip of land in question in November, 1890, or did it begin to run only from the time the mortgage made by Wells and wife became due in August, 1893? The trial court was of the opinion that adverse possession began to run from the latter date, and so instructed the jury. The rule seems to be well settled that, where a mortgagor conveys mortgaged real estate, his grantee takes subject to the mortgage and the statute of limitations does not begin to run against the mortgage until it is due and can be foreclosed. 2 Jones, Mortgages (1st ed.), § 1211; Boswell, Limitations, § 312; 1 Cyc. 1069, par. 42; 1 Am. & Eng. Ency. Law (2d ed.), 815.

The reason for this rule is apparent, because the mortgagee

is not entitled to possession of the mortgaged premises until the mortgage has been foreclosed. He cannot foreclose until the debt becomes due. In the meantime the mortgagor or his grantees are entitled to the possession of the mortgaged premises. The mortgagee is therefore helpless to enforce his rights against a possessor prior to the maturity of the debt secured by the mortgage. The grantee of the mortgagor, with either actual or constructive notice of the mortgage, is conclusively presumed to stand in the place of the mortgagor, and cannot therefore be said to hold adversely to the mortgagee. If this rule controls the case in hand, then there can be no doubt that the instruction given by the trial court was correct. But in this state a mortgage conveys no title to the real estate. The property mortgaged is held merely as security for the payment of the debt (*Hitchcock v. Nixon*, 16 Wash. 281, 47 Pac. 412; *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268; *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923, 87 Am. St. 742); and ceases to be a lien upon the real estate after six years from its maturity, when no payments have been made and no action to foreclose the lien had been commenced within that time. Bal. Code, § 4978; *Damon v. Leque*, 17 Wash. 573, 50 Pac. 485; *Dane v. Daniel*, *supra*; *Krutz v. Gardner*, 25 Wash. 396, 35 Pac. 771; *George v. Butler*, 26 Wash. 456, 67 Pac. 263, 57 L. R. A. 396; *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271; *De Voe v. Rundle*, 33 Wash. 604, 74 Pac. 836.

The mortgagee is not entitled to possession and cannot maintain ejectment under his mortgage. Bal. Code, § 5516. One in possession of real estate, under claim of right from a mortgagor, is a necessary party to a foreclosure of the mortgage, and a decree of foreclosure is not effective as to him. Bal. Code, § 4833; 9 Ency. Plead. & Prac., 305; 2 Jones, Mortgages (6th ed.), § 1406; *Denny v. Cole*, 22 Wash. 372, 61 Pac. 38, 79 Am. St. 940. The rule also is that, "a title acquired by adverse possession is a title in fee simple, and is as perfect a title as one by deed from the original owner or by

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patent or grant from the government." 1 Cyc. 1135 B, and cases cited; 1 Am. & Eng. Ency. Law (2d ed.), 883, and cases cited.

Under the rule that the grantee of a mortgagor is in permissive possession of the mortgaged premises, and does not hold adversely as to the mortgagee, but stands in the same position as the mortgagor, the appellants in this case did not hold adversely to the mortgagee until the time when the mortgage became due and could be foreclosed. The possession of the appellants was the same as the possession of the mortgagor would have been had he retained possession, and had the mortgage not been foreclosed against him. The statute of limitations began to run against the mortgage lien when the mortgage became due. If the lien had not been foreclosed against any one until the expiration of six years after the note became due, no payments having been made thereon, the mortgage lien could not have been foreclosed at all. It would, in that event, have ceased to be a lien; assuming, of course, that the mortgagee or his assigns had remained out of possession of the mortgaged property. In that event, it could not be reasonably claimed that adverse possession did not run against the legal title, merely because a mortgage had existed upon the property for a term of years and had been permitted to expire by limitation. In short, as against the mortgagor, adverse possession began immediately at the time appellants took possession; as against the mortgagee holding a mortgage made and recorded at the time of taking possession, the statute of limitations did not begin to run until the mortgage became due.

When the mortgage was foreclosed against the mortgagor Wells and wife and Young and wife holding the record title, appellants were not made parties to the foreclosure. Their interest in the land was, therefore, not affected by the foreclosure, which was a nullity as to them. It was good as to all parties served or appearing in the action, and the foreclosure and sale vested all the interest of the parties, legal and equi-

table, in the purchaser at the sale, subject to redemption under the statute. If appellants in possession of the strip of land in question had been made parties to that foreclosure, their interests, acquired by purchase, by adverse possession, or in any other way, from the mortgagor or persons holding the legal title, would have become vested in the purchaser at the foreclosure sale. Whatever previous rights existed in favor of appellants would have been terminated at that time, and whether possession was taken or not by the purchaser at the foreclosure sale, adverse possession as to such purchaser could only run from the time of the sale. But since the appellants were not made parties to the foreclosure proceedings, such proceedings were not effective as to them, and they continued to hold possession and the right of possession the same as though the mortgage had not been foreclosed. Their interest was not foreclosed.

If instead of the foreclosure, the mortgagor and his grantees, Young and wife, in the year 1895, at the time of the foreclosure, had given a deed of the whole of lot 7 to the mortgagee, and the mortgagee and his grantors had permitted the appellants to remain in possession adversely for the period of ten years from the time they first acquired possession, it could not then be claimed that the possession of the appellants had been held adversely only from the time the mortgage became due; because, in that event, the title acquired by the deed would have been subject to all rights against Wells and wife and Young and wife, notwithstanding the mortgage lien. In order to extinguish these rights it would have been necessary to foreclose the lien of the mortgage against all subsequent holders of the legal title and actual possessors, notwithstanding the deed. Since the appellants were not made parties to this foreclosure, the purchaser at the foreclosure sale and their grantors held only a mortgage lien against the strip in the possession of respondents, and are therefore under the statute not entitled to the possession until the lien is

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foreclosed. They cannot maintain an action for possession until they have foreclosed the lien against the possessor.

At the time respondents dispossessed appellants, the ten-year period of adverse possession had fully run in favor of appellants against all persons having title, and the legal title was therefore perfect in appellants. At that time, also, the statute of limitations had run against the right to foreclose the mortgage as against the appellants. Their rights were therefore unaffected by the mortgage. If Wells and wife had not given the mortgage, and appellants had been permitted to hold possession as they have done for thirteen years, neither Wells and wife nor their grantees could now claim that appellants had not acquired a perfect title to the land in question by adverse possession. The fact that the mortgage lien has been permitted to expire by limitations as to the appellants, places them in the same position as though the mortgage had never been given. It follows that the period of adverse possession in this case began to run from the time appellants took possession of the land in question, and that the lower court erred in instructing the jury that it began from the time the mortgage became due.

The judgment must therefore be reversed, and the cause remanded for further proceedings in accord with this opinion.

DUNBAR, FULLERTON, RUDKIN, CROW, and HADLEY, JJ., concur.

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141	265

[No. 5746. Decided December 5, 1905.]

ALBERTINA UNZELMAN *et al.*, Appellants, v. THE CITY OF
SNOHOMISH *et al.*, Respondents.¹

ADVERSE POSSESSION OF STREETS — ESTOPPEL — COMMUNITY PROPERTY—PETITION TO VACATE STREETS SIGNED BY HUSBAND. Where the title is taken to platted real estate in the name of the wife, and the husband petitioned the city council for the vacation of certain dedicated streets occupied by them, and running through the premises, which petition was denied, the property being presumably community property, the parties must be held to have recognized the rights of the city in and to the streets and cannot invoke the equitable doctrine of estoppel against the city's right to assert dominion over the streets, by ordering the removal of obstructions and permanent improvements thereon.

SAME—HOSTILE CHARACTER OF POSSESSION. Adverse possession of streets as against a city cannot be claimed by owners who, after platting the same, had fenced up and used the same for a period of ten years, where they at all times had recognized the rights of the city and had leased portions with the understanding that the lessees should respect the rights of the city therein.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered January 7, 1905, upon findings in favor of the defendant, after a trial on the merits, quieting its title to certain streets and alleys. Affirmed.

Dailey & Clay and *Frank D. Lewis*, for appellants.

John W. Miller, for respondents.

HADLEY, J.—This is an action to quiet title to land, and an injunction is asked against the city of Snohomish to prevent it from asserting any dominion over the disputed territory, which it claims constitutes public streets and alleys in said city. The complaint alleges that in 1891 the land was duly platted by the then owner into lots, blocks, streets, and alleys, as "Mrs. Hogan's Second Addition to Snohomish;" that it was then inclosed by a fence, was nearly all under

¹Reported in 82 Pac. 911

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cultivation, and that the owner resided thereon; that upon the map of said plat was a strip marked as "Third street," and another marked as "Cypress street," together with other strips marked as streets and alleys; that no part of said Third or Cypress streets was ever opened or prepared for public use, or traveled by the public, and that the territory thereof has been wholly unoccupied except by its successive owners; that after the filing of the plat, the then owner cultivated the land and resided upon it until it was sold and conveyed by her; that in February, 1902, the plaintiffs purchased from one McGuinness and wife what is known as block 1, and the east half of block 6, in said addition, all of which was then inclosed by a fence as one tract, and that it was purchased and conveyed with the understanding that it was one tract; that the land was so actually held and occupied by said owners, who were grantors of the plaintiffs in direct line, and was openly, notoriously, continuously and adversely so held and occupied by all the plaintiffs' grantors from the time it was platted as aforesaid; that the city of Snohomish has not, during all of said years prior to the 16th day of March, 1904, set up or claimed any right therein, but that from said time it has asserted its right to cause the fences and property of plaintiffs to be removed from within the limits of what was marked on said plat as Third street, Cypress street, and alleys, and that it is now threatening to remove said property; that permanent improvements have been made upon said streets and lands with the full knowledge of said city, and if at any time the latter had the right to open up the streets, such right has been lost and barred by estoppel, and by adverse possession for more than eleven years.

The city was temporarily enjoined pending the action, and it thereupon answered the complaint, alleging among other things that, in January, 1891, before Mrs. Hogan filed her said plat for record in the auditor's office of Snohomish county, she duly presented the same to the city council of

said city for its acceptance and approval, in compliance with an ordinance of the city regulating the manner and form of making, approving, and filing such plats, and that the city duly approved and accepted the same; that in said plat she expressly dedicated to the public for the public use forever all of the streets and alleys marked and designated thereon; that ever since said time the streets and alleys above mentioned have been public streets and highways; that while they were in the possession of said city as such, on or about December 1, 1903, the plaintiffs wrongfully and unlawfully entered thereon to the exclusion of public traffic; that the title to the lots and blocks remained in the owner who platted them, until the date of her death in the year 1900; that she always recognized the rights of the city in said streets and alleys, and never at any time claimed to hold any part thereof adversely to the rights of the city; that the plaintiffs, on April 1, 1902, after purchasing said lots and blocks, presented to the city council of said city a petition for the vacation of said streets and alleys, which petition, after a hearing, was denied; that the city never opened said streets and alleys, for the reason that there was no public necessity therefor, in the judgment of the city council, until within the past two years, when the growth of the city demanded it, and that public necessity now requires it.

Upon substantially the above issues, the cause was tried by the court without a jury, and the court made and entered findings of facts and conclusions of law. The material facts were found substantially as alleged in the answer, and as above shown. It was particularly found that public necessity requires the use of the streets and alleys for sewers, drainage, and sanitary purposes, as the only practical outlet for sewers and drainage of said plat into Pillchuck creek, on the east boundary thereof. As a conclusion of law, the court found that the city was entitled to a decree quieting its title and rights in and to said streets and alleys, and award-

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ing it the possession and restitution of the same. Such a decree was entered, and the plaintiffs have appealed.

Appellants assign errors upon the court's findings. We think the material ones are sufficiently supported by the evidence, and it would not be profitable here to discuss the evidence with relation to all the criticized findings. It is insisted that the city is equitably estopped to assert any rights in or dominion over said streets and alleys. The court found that in April, 1902, the appellants themselves, after purchasing the lots above mentioned, petitioned the city council to vacate these streets and alleys; that their petition was denied, and that this was before they made any of the improvements which they claim to have placed within the limits of the designated streets or alleys. Objection is made to this finding. The evidence shows that the petition was signed by appellant F. H. Unzelman, and was filed with the city clerk April 1, 1902. Minutes of the proceedings of the city council of May 6, 1902, show that the petition was laid upon the table indefinitely. Appellant Albertina Unzelman did not sign the petition, and she was named as grantee in the deed upon which appellants base their asserted rights herein. It is therefore claimed that she did not ask for the vacation. The appellants were, however, husband and wife when the conveyance was made, and have since continued to be such. The complaint alleges that both appellants purchased the property, and it must therefore be presumptively community property. The husband has the management and control of the community real property. Bal. Code, § 4491. The petition for vacation was incidental to such management and control, and it was presumptively in behalf of the community, particularly so as it does not appear to have been without the wife's knowledge or consent. The finding was therefore correct, and inasmuch as appellants thus petitioned the city for the vacation of the streets soon after they purchased the property, they thereby recognized that the city did claim

rights in the streets, and that it was then asserting dominion over them. They afterwards proceeded to erect in the streets improvements of a permanent nature. They are not, therefore, in position to invoke equitable estoppel against the city. They are rather in the position of wrongdoers who have knowingly and wilfully undertaken to obstruct the streets. Courts of equity will not afford relief by way of estoppel under such circumstances. *Johnson v. Maxwell*, 2 Wash. 482, 27 Pac. 1071.

"In addition to this consideration may be noted another influential one already suggested in a different connection, and that is, the private use of the public way was wrong in the beginning and wrong each day of its continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim. It is, at all events, a great stretch of the doctrine of estoppel and a wide departure from the rule laid down by the earlier decisions and confirmed by the modern authorities." Elliott, *Roads and Streets* (2d ed.), § 884.

See, also, *Ralston v. Weston*, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. 834.

It is contended by appellants that the city has lost its rights in the streets by adverse possession of appellants and their grantors. The court found that adverse possession was not shown by a preponderance of the evidence, and that it is not a fact that the streets were held adversely to the city for a period of ten years or more. We think this finding was amply justified by the evidence. Testimony in the record satisfies us that Mrs. Hogan who platted the land always recognized the rights of the city in these streets up to the date of her death in the year 1900. She leased portions of the addition with the express understanding that her lessees should respect the rights and demands of the city with reference to the streets. She owned a portion of the lots now held by appellants until the time of her death. The facts shown in the case would not establish title in appellants by

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Citations of Counsel.

adverse possession, under even ordinary circumstances and between individuals. It is therefore unnecessary that we shall discuss the further question argued by respondents, that in no event can title be acquired in that manner in lands which have been dedicated for public streets. Under the facts established in the case, that question is not involved, and we have therefore not passed upon it.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 5806. Decided December 6, 1905.]

W. L. GAZZAM, *Respondent*, v. IVER B. MOE *et al.*,
Appellants.¹

SHIPPING—SALE OF VESSEL—APPURTENANCES—WHAT ARE. A crank shaft which had been replaced by a new one, and a new duplicate unattached rudder on a boat, do not pass under a bill of sale as "appurtenances" or "necessaries," where the vendor had another boat on which they could be used, the vendee did not know of the rudder, and they were not really necessary for the business in which the boat was engaged; since it fairly appears that they were not in the contemplation of the parties, and nothing is considered an appurtenance unless requisite to the use of the boat.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 16, 1905, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action of replevin. Reversed.

Fred H. Peterson and *H. C. Force*, for appellants, cited: *Newberry v. The Fashion*, 18 Fed. Cas., No. 10,143; *Burchard v. Tapscott*, 3 Duer 363; *Gullmann v. Sharp*, 30 N. Y. Supp. 1036; 2 Am. & Eng. Ency. Law (2d ed.), 522; *Wood-*

¹Reported in 82 Pac. 912.

hull v. Rosenthal, 61 N. Y. 382; *Ogden v. Jennings*, 62 N. Y. 526; *Root v. Wadhams*, 107 N. Y. 384, 14 N. E. 281; *Woods v. Russell*, 7 E. C. L. 310; *Wood v. Bell*, 5 E. & B., Q. B., 772, 88 E. C. L. 354; *Gale v. Laurie*, 11 E. C. L. 187; *Coltman v. Chamberlain*, 25 Q. B. D. 328; *The Edwin Post*, 11 Fed. 602; 1 Abbott, Merchant Ships (14th ed.), 32; *Richardson v. Clark*, 15 Me. 421; *Starr v. Goodwin*, 2 Root (Conn.) 71; Benedict, Admiralty (2d ed.), § 268; *The Alexander*, 1 W. Robinson, Admiralty, 346, 361; *Gilbert etc. Co. v. Roach*, 2 Fed. 393; *Forrest v. Vanderbilt*, 107 Fed. 734, 52 L. R. A. 473.

Allen, Allen & Stratton, for respondent, cited: *Thomas v. Owen*, 20 Q. B. D. 225; *Hall v. Benner*, 1 Penr. & W. 402, 21 Am. Dec. 394, citing Shepard's Touchstone 89; *Missouri Pac. R. Co. v. Maffitt*, 94 Mo. 56, 6 S. W. 600; *James v. Plant*, 31 E. C. L. 170; *Commonwealth v. Curley*, 101 Mass. 24; *Sparks v. Hess*, 15 Cal. 186; *Kenney v. Apgar*, 93 N. Y. 539; *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68; 2 Bouvier Dic., Title "Ship"; 25 Am. & Eng. Ency. Law, 851; *Gale v. Laurie*, 11 E. C. L. 187; *Webster v. Seekamp*, 6 E. C. L. 352; *The Rega*, L. R. Adm. & Eccl. Cases (1869-72), p. 516.

DUNBAR, J.—The plaintiff purchased the steamer "Reliance" from defendants, and took a bill of sale for her, dated March 1, 1905. Prior to this date, he held an option for such purchase, dated February 13, 1905. This action is for the recovery of the crank shaft and rudder, of the agreed value of \$700.

At the time of the sale, neither of the articles in dispute was attached to the boat, but at the time the option was secured the crank shaft was on the boat, and was seen there by the plaintiff. The plaintiff testifies that he did not see the rudder, and did not know that it existed until after he had purchased the boat. It is alleged that the rudder had been

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made for the steamer Reliance prior to the sale, but had not been placed in the boat. It appears that the crank shaft had been removed from the boat some two years before the sale, and a new crank shaft had been put in its place. It appears from the testimony that the rudder was made from a measurement of the rudder on the steamer Reliance, but it also appears that both the rudder and the crank shaft in dispute could be used in other boats. The defendants were also the owners and operators of another boat. The judgment was for the plaintiff for the property, of the admitted value of \$700. From this judgment this appeal is prosecuted.

The essential part of the bill of sale is as follows:

"Sold unto said W. L. Gazzam . . . the whole of the said screw steamer or vessel together with the whole of the masts, sails, boats, anchors, cables, tackle, furniture and all other necessities thereunto appertaining and belonging."

And the habendum clause is, "To have and to hold the said screw steamer Reliance and appurtenances thereunto belonging" unto said Gazzam. There is some contention by appellants that, inasmuch as the word "appurtenances" is used only in the habendum clause and not in the granting clause, the construction of the article must be simply upon the word "necessaries;" but this is too technical a construction, if indeed there is any difference between the words "furniture and all other necessities thereunto appertaining," and the word "appurtenances." But construing this bill of sale with reference to all its provisions, aided by the testimony in the case, which is practically undisputed, we think the court erred in coming to the conclusion that the crank shaft and rudder in controversy were a part of the equipment of said steamer. This is found as a fact by the court, but in reality it is a conclusion of law, for whether these articles were a part of the equipment of the steamer depends upon the facts proven in the case.

The first case relied upon by the respondent is *Newberry v. The Fashion*, Fed. Cas. No. 10,143, where it was held

that, where one sells a steamboat with all appurtenances, etc., and prior to the sale the owner had procured a new ash-pan, for the boiler, which had been delivered to the owner but was not placed on board of the boat, the ash-pan passed under the bill of sale as appurtenant to the boat. And, at first glance, this case seems to render support to respondent's contention. But a particular examination of the case convinces us that it was decided upon an entirely different principle from the one at bar, and really has no application to it. It appears in that case that the old ash-pan was worn out and rendered the navigation of the vessel unsafe; that the new ash-pan was delivered at the dock during the winter after the navigation had closed, and *The Fashion* was in dock for the winter; that it fitted the vessel for which it was made, and that the old one was unfit for service, and of no value but as old iron. In such a case as that, we think that the court correctly concluded that the new ash-pan was a part of the tackle of the boat, and an appurtenance thereto. Certainly, if the old one was worn out, the new one was a necessary attachment to the boat under any theory. It was made for the boat; it was to take the place of one that was not fit for further service, and which was of no value whatever, as an ash-pan at least, and was intended to be henceforth used on *The Fashion*. But in this case, while the evidence shows that the rudder was made from a measurement of the old rudder on the *Reliance*, it also shows that it could be used on any other boat, that the owners had another boat, and that the rudder which was already in use on the *Reliance* was a good rudder, serviceable for the business in which the *Reliance* was engaged. So far as the crank shaft is concerned, it is entirely outside of the theory of the case just cited. In this case it is not a contention over an alleged new appurtenance, but over an old one which had been displaced by a new one, and had been displaced for the long period of two years.

Another case cited is *The Alexander*, 1 Dodson (Eng. Admr. Rep.) 278, where a consignee of a cargo advancing

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money for the necessary repairs of a ship had taken a bond of hypothecation; *held*, that the warrant of the court would extend to the sails and rigging taken on shore for the purpose of safe custody, as well as to the ship itself. The court, in discussing that proposition, says:

"The only question that remains is, that which relates to the sails and rigging; and these, it is said, are detached from the ship, and not within the jurisdiction of the court. But how are they detached? Why, merely for the purpose of safe custody, and with the view of being returned to the ship when she goes out upon any new adventure, in conformity to what is stated to be the usual custom at the port of Liverpool. I cannot think that they are so detached, in a legal sense, as to prevent the warrant from extending to them as well as to the ship itself."

The case does not seem, in any essential, to be applicable to the case in point, where it is conceded that neither of the alleged appurtenances sued for was necessary for the use of the ship in the prosecution of its ordinary business.

In *Woods v. Russell*, 7 Eng. Com. Law Rep. 310, it was held that the rudder and cordage, which had been removed from a ship, were to be considered as parts of the ship. But it will also be seen from an examination of the opinion in that case that the decision was rendered for reasons that could not apply here, the court saying:

"And as to the rudder and cordage, as they were bought by Paton specifically for this ship, though they were not actually attached to it at the time his act of bankruptcy was committed, they seem to us to stand upon the same footing with the ship, and that, if the defendant was entitled to take the ship, he was also entitled to take the rudder and cordage as parts thereof."

As we have indicated, the crank shaft in this case was not made for the ship—at least, it had been detached from the ship and another crank shaft which had been made especially for the ship had been substituted—and the use of the rudder was equally as applicable to other ships as to the *Reliance*.

But as showing the construction that was placed upon this case by the same court, several years afterwards, in *Wood v. Bell*, 6 Ellis & Black. 355, it was held that loose engines and materials were not appurtenances to the ship, the court saying:

“But I do not think that, as the court below seems to have held without much consideration, the unfixed materials destined for the ship did pass. They do not appear to have been circumstanced exactly as the rudder and cordage were in *Woods v. Russell* . . . where they had become, it seems, a part of the ship. Here they are merely provided for the ship. If the circumstances in *Woods v. Russell* were the same as here, I should doubt whether the decision in that case was right. . . . The question is, What is the ship? not, What is meant for the ship? I think those things pass which have been fitted to the ship, and have once formed part of her, as, for instance, a door hung upon hinges, although afterwards removed for convenience. I do not think that the circumstance that materials have been fitted and intended for the ship makes them part of the ship.”

It seems to us that the only rule that can be laid down in a case of this kind is that only those things will be considered appurtenances and necessities to a ship which are really necessary to it in carrying on its accepted business, and that there is no implied warranty that duplicates shall be furnished. If simply because the crank shaft in this case had once belonged to the ship, and had been used by it as a part of its machinery, the respondent or purchaser would be entitled to it when another new and better crank shaft had been substituted, all the crank shafts which had ever been in use in the ship would have to answer to his demands. It might reasonably be that the contemplation of the right to dispose of the old appurtenances to a boat was the determining cause in purchasing the new, the value of the old diminishing *pro tanto* the expense of the new. Certainly under such circumstances, it would be inequitable to deprive the owner of the value of the old machinery. That the owner

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had not yet disposed of it at the time he sold the boat does not in any manner change the equities.

In *Burchard v. Tapscott*, 10 N. Y. Sup. Ct. 363, it was held that a bill of sale conveying a vessel with her masts, bowsprit, sails, boats, anchors, cables, and all other necessities thereto appertaining and belonging, does not pass the ballast which is on board the vessel at the time of the sale; movable ballast, whether it consist of iron, stone, or any other substance, not being a necessary appurtenance to the ship.

It is said by Mr. Parsons, in his work on Shipping and Admiralty, at page 79, under the title of "What are Appurtenances of a Ship," that it would seem to be deducible from the cases that nothing is to be considered an appurtenance of a ship unless requisite to its proper use. And in Abbott's *Merchant Ships and Seamen*, after a review of the cases, it is said, on page 34: "The result of the decisions seems to be that, under the word appurtenances, as used in a bill of sale, everything belonging to the ship, which is necessary for her as a ship, passes, . . ." An appurtenance has been defined as a thing belonging to another thing as principal, and which passes as incident to the principal thing. However, a discussion of the definition of the word "appurtenance" is really not material, because those things which are incident to the principal thing would pass by the sale of the principal thing, whether the word "appurtenance" was used or not; nothing is added by its use, or lost by its omission.

In all the cases which we have been able to find, there is none which we think would sustain the judgment of the court in this case. It seems to us that, both from the testimony and the bill of sale, these articles were not within the contemplation of the parties when the sale was made and, most certainly, the boat having an efficient rudder and an efficient crank shaft, they were not necessities. If the purchaser should be entitled to the duplicates of the machinery without special mention in the bill of sale, by the same reasoning he would be entitled to triplicates, or any number of the

articles that the owner of the vessel might see fit to have on hand. Whether these duplicates or triplicates would be in existence depends largely upon the temperament of the owner as to whether he was an extremely cautious man, or a man inclined to take risks. One man might be willing to start out on a voyage with one rudder or one crank shaft. Another one, more cautious, might think it would be necessary to have two on hand. Another one, still more apprehensive, three or more. Or certain portions of the machinery of the boat might be bought by wholesale, the operator thinking that in the course of a lifetime he might have use for them on the boat that he was then operating, or some other boat which he might afterwards possess. If the rule announced by the court should be sustained, everything that had belonged to the boat prior to the sale could be claimed and obtained by the purchaser. We think this contention cannot be sustained upon either reason or authority.

The judgment will be reversed, and the cause remanded, with instructions to find for the defendants in the action below.

MOUNT, C. J., HADLEY, FULLERTON, RUDKIN, CROW, and ROOT, JJ., concur.

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[No. 5885. Decided December 6, 1905.]

THE STATE OF WASHINGTON, *on the Relation of R. O. Reed,*
Respondent, v. M. H. GORMLEY, *as County Treasurer*
for King County, Respondent, and H. H.
EATON, *Intervener, Appellant*.¹

INJUNCTION—PARTIES—ACTION TO ENJOIN PAYMENT OF WARRANTS. In an action to restrain the payment of county warrants, there is a defect of parties defendant and the court has no jurisdiction of either the subject-matter or the parties, where it appears from the complaint that the warrants had been transferred to unknown holders whose presence cannot be secured.

SAME—HOLDERS UNKNOWN—DIFFICULTY AS TO SERVICE. The difficulty of service of process is no excuse for failure to join necessary parties defendant.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 23, 1905, perpetually enjoining the payment of county warrants, upon overruling a demurrer to the complaint. Reversed.

P. C. Sullivan (*W. R. Bell*, of counsel), for appellant.

Kenneth Mackintosh and *R. W. Prigmore*, for respondent Matt H. Gormley.

Blaine, Tucker & Hyland, for respondent relator.

DUNBAR, J.—The complaint alleges that, on the 29th day of October, 1903, the board of county commissioners of King county, state of Washington, made and entered into a certain agreement with one H. H. Eaton. The substance of the agreement is to the effect, that the commissioners would employ said Eaton to act as special attorney and counsel to assist in recovering real property situate in said county, and any interest therein of which any person may have died seized, not having devised the same and leaving no husband, wife,

¹Reported in 82 Pac. 929.

or kindred, and for the recovery of personal property or any right or interest therein, the owner of which may have died being resident of said county at the time of his death, not having disposed of the same by will, and leaving no husband, widow, or kindred; that the said Eaton should advance all sums necessary to the prosecution of said suits, and receive no compensation for services in any unsuccessful proceeding, but that in successful proceedings he should be reimbursed for one-half the amount he may have advanced, and should also receive one half of the actual cash value of any such real or personal property that might be recovered in such proceedings through his agency; that, under said agreement, said Eaton claims to have performed certain services in causing certain lands to be escheated to the state of Washington, for the benefit of the common school fund of King county, and that the county commissioners had, in accordance with their contract, caused the claim to be allowed to the said Eaton for \$7,000, being one half of the value of a certain estate which had been escheated to the state of Washington for the benefit of the school fund of King county, and had directed the auditor of King county to make, execute, and deliver, in the manner and form provided by law, fourteen warrants, each for the sum of \$500, drawn in favor of H. H. Eaton upon the current expense fund of King county, Washington; that thereafter the auditor of King county did issue the said warrants upon said fund; that thereafter the said Eaton caused the said warrants to be presented to the county treasurer of King county, who stamped upon the back thereof that the same had been presented and were not paid for want of funds; and it is alleged that the county commissioners had no authority to enter into said contract, or to approve the bill of the said Eaton, or to order the delivery of the warrants above referred to, and that the warrants are not a legal or lawful debt of said King county. It is alleged that, unless restrained by order of the court, the county commissioners

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will pay said warrants to the irreparable injury and damage of the plaintiff and all other taxpayers of King county. This action is brought in the name of the state, on relation of one R. O. Reed.

The amended complaint also alleges that the said H. H. Eaton is not the owner of said warrants at the present time; that the names of the true owners are unknown to the plaintiff, and that, after diligent search and inquiry, plaintiff has been unable to learn the names of the owners of said warrants. The petition prays, that the treasurer be enjoined and restrained from paying in any manner any of said warrants; that said warrants and each of them be declared illegal and void, and of no effect or force, and be declared to be no right, lien, or debt against King county or the state of Washington. A demurrer was interposed to this complaint on the grounds, (1) that there is a defect of parties defendant, and (2) that said complaint did not state facts sufficient to constitute a cause of action. There were other proceedings and pleadings in the case, but we have stated sufficient upon which to base a decision. The demurrer was overruled and judgment entered perpetually enjoining the treasurer from paying the warrants.

We will not enter into a discussion of the alleged invalidity of the agreement recited in the complaint, for the reason that a question is presented at the threshold which seems to us to be decisive of the case, and that is, that there was a defect of parties defendant. It is a rule of law, as old as the law itself, that a court cannot adjudicate the rights of parties who are not actually or constructively before it, with an opportunity to defend or maintain their rights in the action. In this case the holders and owners of the warrants, not having been made parties to the action, the court has neither jurisdiction of the persons or the thing. If it had either, there might be some basis upon which it could proceed. But it is inconceivable what effect a judgment would

have which was rendered without jurisdiction of either the parties or the thing which is the subject of the controversy. If it is an action *in personam*, confessedly upon the alleged amended complaint the court has not obtained jurisdiction of all the parties in interest. If it could be construed to be an action *in rem*, it is equally manifest that there is no jurisdiction of the *res*. The parties would not be bound by the judgment, and it would be purely a moot question which would be determined by the court. As was said in *Anthony v. State ex rel. Beebe*, 49 Kan. 246, 30 Pac. 488:

“There are sufficient real controversies in all countries, between real parties in interest, to be litigated in the courts of justice, without resorting to fictitious controversies between nominal parties, or between parties whose interests may all be on the same side.”

In that case, in an action for an injunction to perpetually enjoin a city and its officers and certain county officers from levying or collecting any taxes to pay interest on certain city bonds, and to have the bonds declared null and void, it was held that the bondholders were necessary parties, and that the action could not be maintained without also making them parties. That the judgment would be void and of no effect was decided by this court in *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. 25, where, after discussing other questions which had been raised in an action brought to determine the legality of certain bonds, the court said:

“Such being their character, the court would, it seems to us, be doing an idle and vain thing in decreeing them invalid. Such a decree could have no binding force as against strangers to the record;”

citing *Mallow v. Hinde*, 12 Wheat. 193, 6 L. Ed. 599, where the court said:

“No court can adjudicate directly upon a person’s right, without the party being either actually or constructively before the court;” and *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158, where it is said that the court can make no decree

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affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights. Also, citing *California v. Southern Pac. R. Co.*, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683, in which Chief Justice Fuller, speaking for the court, says:

“Sitting as a court of equity we cannot, in the light of these well-settled principles, escape the consideration of the question whether other persons who have an immediate interest in resisting the demand of complainant are not indispensable parties or, at least, so far necessary that the cause should not go on in their absence. Can the court proceed to a decree as between the state and the Southern Pacific Company, and do complete and final justice, without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience?”

In *Savage v. Sternberg*, 19 Wash. 679, 54 Pac. 611, 67 Am. St. 751, it was held that a party or officer was not bound by a void injunction or order of the court, and would not be punished for its violation, approving the rule laid down in *Stallcup v. Tacoma*, *supra*; citing from Freeman on Judgments (4th ed.), § 117, where that author says:

“A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers.”

If that be true what an idle action it would be on the part of the court to pass upon the validity of the warrants sought to be enjoined in this case, when the judgment which the court would enter would have no legal effect and bind no one.

That such a judgment would be void is asserted by Mr. Freeman, in § 116, where he says:

“If the want of jurisdiction over either the subject-matter or the person appears by the record, or by any other admissible evidence, there is no doubt that the judgment is void.”

In *Graham v. Minneapolis*, 40 Minn. 436, 42 N. W. 291, a demurrer for defect of parties was held properly sustained where the complaint showed on its face that a third party named owned the claim the payment of which was sought to be enjoined. Says the opinion:

“The plaintiff alleges that on the 10th day of September, 1887, the certificate was, for value received, assigned to De Motte, and that he is now the owner and holder thereof, . . . In equity practice, before the code, the general rule was that you must have before the court all whose interests the decree may touch, because they are concerned to resist the demand, and in order to avoid the necessity of trying the case in halves. . . . In this case it is clear that De Motte is specially interested in the controversy touching the validity of the claim, and is entitled to be heard upon that matter. And the defendant is also interested in being protected from future litigation. But a judgment against it alone would not bind De Motte or end the controversy.”

In *Bradley v. Gilbert*, 155 Ill. 154, 39 N. E. 593, where it was sought to enjoin the issuance and payment of certain county orders, on the ground that the action of the county commissioners directing their issuance was illegal, it was held that the county was a necessary defendant. It is certain that the reasoning of the court in sustaining this contention would apply equally in this case in favor of holding that it was necessary for the owners of the warrants to be made parties to the action. The court said:

“‘It is a well established rule, in equity, that all persons are to be made parties who have any legal or equitable interest in the subject-matter and result of the suit.’ The numerous authorities in support of this rule need not be cited.”

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It cannot be gainsaid that the interest of the holders of the warrants in this case is equal to the interest of the county. It is true that difficulties and inconveniences and even hardships may arise, but there are many cases in which it is difficult to get service upon those whom it is desirable to make defendants in actions, and such difficulties can never be held sufficient to override the well established rule that no person can be bound by the judgment of a court in an action to which he was not made a party. It is said by the respondents that, if the warrants are legal, there is nothing to prevent the holder from establishing their legality by intervening in this suit. The answer to that is that, in presumption of law, the parties are not aware of the action. That is the reason that the law provides for notice as a prerequisite to conferring jurisdiction. In accordance with both reason and authority, we think the court in this case was acting without jurisdiction to try the cause, and that the demurrer to the complaint should have been sustained.

The judgment of the court will be reversed, and the cause remanded with instructions to sustain the demurrer to the complaint.

MOUNT, C. J., FULLERTON, RUDKIN, and HADLEY, JJ., concur.

[No. 5835. Decided December 6, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. HENRY
STRODEMIER, *Appellant*.¹

VENUE—CHANGE—PREJUDICE OF JUDGE—RELATIONSHIP TO PROSECUTING WITNESS—ABUSE OF DISCRETION. The fact that the trial judge is a brother of the prosecuting witness is not alone sufficient to sustain a charge of prejudice, and a denial of a motion for a change of venue based on such fact will not be reviewed except for abuse of discretion.

SAME—PREJUDICE OF JUDGE—ERRONEOUS RULINGS. Erroneous rulings of a judge during the trial, after the denial of a motion for a change of venue, do not convict him of prejudice entitling the accused to the change.

CRIMINAL LAW—CATTLE STEALING—JUSTIFICATION UNDER AGREEMENT—CROSS-EXAMINATION—MISTAKE AS TO CATTLE REFERRED TO. Upon a prosecution for the larceny of four head of cattle running on the range, the taking of which is admitted and justified under an alleged agreement with the owner that the accused could take up and sell four steers of the same brand, not gathered by the owner the winter before, the accused has the right, after the prosecuting witness has testified that he did not authorize the accused to take up and sell the cattle described in the information, to show on cross-examination the aforesaid agreement, without confining the inquiry to the cattle specified in the information; since the cross-examination is directly connected with the testimony in chief, and the taking of any cattle in good faith under the agreement would be a complete defense to the accusation.

CRIMINAL LAW—EVIDENCE AS TO PREVIOUS CHARGES AGAINST ACCUSED. Upon a prosecution for larceny it is unnecessary, and prejudicial error, for the state, in order to lay a foundation for introducing the testimony of the accused on former trials, to show that the accused had twice before been charged with and put on trial for similar offenses.

SAME—LAYING FOUNDATION. Such evidence is not justified in the state's case in chief, as a foundation for the evidence on the former trial, since it is only when desired for impeachment that it is necessary to lay a foundation by showing the time, place, and circumstances of the statement.

¹Reported in 82 Pac. 915.

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Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered May 26, 1905, upon a trial and conviction of the crime of cattle stealing. Reversed.

W. J. Canton and *W. E. Southard*, for appellant.

W. A. Reneau and *Sam B. Hill*, for respondent.

RUDKIN, J.—The appellant was convicted of the crime of cattle stealing, and prosecutes this appeal from the judgment and sentence of the court. Before the commencement of the trial, the appellant moved for a change of venue under Bal. Code, § 6794, on the ground that he believed he could not receive a fair trial in the county where the action was pending, owing to the prejudice of the judge. This motion was denied. The affidavit in support of the motion averred, in substance, that one F. S. Steiner, of Douglas county, Washington, was a brother of the presiding judge of the court in which the prosecution was pending; that said F. S. Steiner was the secretary, and a salaried officer, of the Eastern Washington Stock Association, of said Douglas county; that the principal object of said association was to prosecute offenders for the crime of cattle stealing; that said F. S. Steiner was the chief prosecuting witness against the appellant, was chiefly instrumental in pressing the prosecution against him, and took an active interest therein; that by reason of said facts and said relationship the appellant believed that he could not receive a fair and impartial trial before said judge. It was not shown or claimed that the presiding judge had any interest whatever in said prosecution, or that any act or statement of his indicated prejudice on his part.

The mere relationship of a judge to a person interesting himself in the prosecution of a criminal charge, pending before such judge, is not sufficient, of itself, to sustain a charge of prejudice against the judge. Courts are always reluctant to try cases in which their fairness is challenged,

however slight the foundation for the challenge may be, but applications of this kind are addressed to the sound discretion of the trial court, and appellate courts will not interfere unless an abuse of that discretion is shown. No such abuse is shown in the record before us. The appellant further contends that an inspection of the record on appeal will convince this court that the presiding judge was in fact prejudiced against him. If we are permitted to inspect the record to aid us in determining this motion, mere erroneous rulings of a trial judge do not convict him of prejudice against the party to whom the rulings are adverse. *Burke v. Mayall*, 10 Minn. 287.

Passing now to the merits of the case, the information charges, and the proof tends to show, that the cattle in question were taken or stolen on or about September 25, 1904. The taking of the cattle by the appellant was not an issue in the case, at least, after he took the witness stand in his own behalf. He admitted the taking, and sought to justify or excuse his acts under the following agreement. Some time in the month of April, 1904, the appellant had a conversation with the prosecuting witness, relative to four head of cattle belonging to the prosecuting witness, which were left out on the range during the preceding winter. In such conversation, the prosecuting witness agreed to give the appellant one of said cattle, or 25 per cent of what the appellant could get out of them, in case he should find them. While the prosecuting witness was on the stand as a witness for the state, he testified, in response to questions asked by the prosecuting attorney, that he never authorized the appellant, or one Claypool jointly informed against with the appellant, or any other person, to sell or dispose of the cattle described in the information, at any time prior to September 25, 1904. On the cross-examination of this witness the following occurred:

“Q. Did Strodemier [the appellant] stop at your place along about April, 1904? Objected to as immaterial and

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improper cross-examination. A. I believe so. Q. Didn't you have a conversation with him at that time with reference to some cattle you had upon the range that you hadn't gathered the year before? Objected to as improper cross-examination. Objection sustained by the court, to which ruling the defendant by his counsel then and there excepted. Q. I will ask you to state to the jury if you did not in April, about the month of April, 1904, state to Mr. Strodemier that you had some steers running on the range that you had not gathered the winter before, and did you not then authorize him that, if he found these cattle, these four steers, that he might gather them and that you would give him one of them, or would give him 25 per cent of what he could get out of them. Objected to as immaterial, irrelevant, incompetent and improper cross-examination. Sustained by the court. Q. Branded with your brand, that you have described here? I will ask you if, in the month of April, if you did not give the defendant here leave to gather these cattle described in the information? A. No, sir. Q. Did you not at that time give him leave to gather four steers branded with this brand you have described here? Objection. Immaterial, improper cross-examination. Objection withdrawn. A. I did not have four steers—. Q. State to the jury what the conversation was about. Objected to as immaterial, nothing to do with this case. Objection sustained by the court. Court. I will state that you may go into these four steers mentioned in this information, you may go into that fully, find out all you can, but you will not be permitted to go into a list of other cattle that are not involved in this action. This is cross-examination, you cannot go into the double L brand outside of these four cattle. To which ruling of the court defendant by his counsel then and there excepted. Q. I will ask you if you had other cattle on the range branded with this brand. Objected to as immaterial. Sustained; to which ruling of the court the defendant then and there by his counsel excepted. Q. I will ask you if, about the middle of the month of October, 1904, out at your store in Douglas county, Washington, if you did not tell Major Canton that you gave the defendant permission to gather four head of cattle, branded with your brand, and that you would give him one of the cattle, or would give him 25 per cent of what he could get out of

them? Objected to as immaterial, not proper cross-examination, no foundation laid. Court. The ruling is that you cannot go into any other cattle than these four steers, if you will direct your question, shape it along' so as to refer to a material matter, you may ask it; the objection is sustained. To which ruling of the court the defendant by his counsel then and there excepted. Q. I will ask you if at any time you gave the defendant permission to gather any cattle branded with this brand. Objected to, and objection sustained. To which ruling of the court the defendant by his counsel then and there excepted."

There are two material errors in these rulings. First, the questions propounded on cross-examination were directly connected with matters testified to by the witness on his examination in chief, and were therefore proper. Second, the ruling of the court that the agreement would constitute no defense unless it were shown to relate to the identical cattle described in the information is clearly erroneous. Had this been a civil action between the appellant and the prosecuting witness, involving the appellant's right to compensation for taking up the cattle, it would then have been incumbent on him to show that they were the identical cattle referred to in the agreement, but in a criminal prosecution the rule is otherwise. If the appellant in good faith believed that these were the cattle referred to in the agreement, and took them up in that belief, he was guilty of no crime, even though he was mistaken. It requires no argument to show that a man should not be convicted of a felony and committed to the penitentiary for an honest mistake, yet this was the clear import of the court's ruling, when it held that the agreement was immaterial and would constitute no defense, unless it related to the identical cattle described in the information. It is no answer to this to say that the appellant might have called the prosecuting witness in his own behalf. He was under no obligation to do so, but had an absolute right to ask these questions on cross-examination.

It is next assigned as error that the court permitted the

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respondent to prove that the appellant had been twice before tried in the same court on criminal charges. It appears that two criminal cases against the appellant were tried in December, 1904, and January, 1905, and before the trial of the case in which this appeal is taken. The state deemed some of the testimony given by the appellant on such former trials material on the trial of this case, and to prove such testimony called the stenographer who reported the testimony on the other trials as a witness. He was asked these questions:

"Q. State whether or not you attended the trial of the State of Washington against Henry Strodemier in January 1905? A. Yes, sir. Q. In this court? A. Yes, sir. Q. State whether or not you took the testimony of this case. A. Yes, sir. Q. State whether or not you took the testimony of the case of the State of Washington vs. Henry Strodemier in another case tried in this court at that time? Objected to as immaterial, irrelevant, incompetent. A. Yes, sir, last of December, 1904, or the first of January, 1905. Objection was overruled. To which ruling of the court defendant by his counsel then and there in open court excepted."

Had the prosecuting attorney stated that the appellant had been twice before tried in the same court for violating the laws of the state for the sole purpose of bringing that fact before the jury, it would have been misconduct on his part; and had the trial court admitted testimony over objection to prove such fact for a like purpose, the ruling would have been plainly erroneous. *State v. Thompson*, 14 Wash. 285, 44 Pac. 533; *State v. Bokien*, 14 Wash. 403, 44 Pac. 899; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523, *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357; *State v. Eder*, 36 Wash. 482, 78 Pac. 1023. The respondent concedes this, but justifies its course on the ground that it was competent for it to prove the testimony given by the appellant on the former trials, and that, before this could be done, it must lay a foundation by stating the time, the place, and the surrounding circumstances. We readily concede that the re-

spondent had a right to prove statements made by the appellant, under oath or otherwise, which had a material bearing on the issues before the court, but its further contention is untenable. These statements or admissions were offered as original evidence, and as a part of the state's main case. It is only where questions are propounded with a view of impeaching a witness that it becomes necessary to lay a foundation for the impeachment by stating the time, the place, and the surrounding circumstances. As well might it be claimed that the execution of a contract could not be proved without first proving that one of the parties to the contract was in the penitentiary at the time of its execution, if such were the fact. Had these questions been propounded to the appellant with a view of impeaching him, there would be some force in the respondent's argument; but even in that case, we think the foundation could have been sufficiently laid without bringing out the fact that the appellant was on trial at the time for a crime. We think a statement of the time and place would sufficiently identify the occasion. A showing that a defendant has been charged with crime on at least two former occasions can have no other effect than to prejudice his case in the eyes of the jury, and all attempts to bring such facts before the jury have been strongly condemned by this court. Prosecuting officers should not allude to them, and trial courts should not tolerate the practice. If a defendant takes the witness stand in his own behalf, the state may prove that he has been theretofore convicted of a felony for the purpose of affecting his credibility, but beyond this it cannot go. We are not prepared to say that what occurred on this trial, in this connection, would be sufficient of itself to warrant a reversal, but we make these observations in view of a retrial that must be granted on other grounds. We do not deem it necessary to discuss the other errors assigned, further than to say that on a retrial the appellant has a right to cross-examine the prosecuting wit-

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ness fully as to the existence and terms of the agreement herein referred to, and to have the effect of such agreement, as a defense, submitted to the jury under proper instructions.

For the reasons heretofore given, the judgment is reversed and a new trial ordered.

MOUNT, C. J., FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5791. Decided December 7, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK SMITH,
Appellant.¹

40	615
140	708

CRIMINAL LAW—ROBBERY—EVIDENCE—SUFFICIENCY—UNCERTAINTY OF REFERENCES BY WITNESS. The evidence of a robbery committed by the accused is not insufficient by reason of the fact that only two of the three persons charged participated in the crime and the references in the record on appeal to the gestures of the witness do not make clear to whom reference was made, there being competent evidence warranting the verdict.

SAME—OWNERSHIP OF PROPERTY—PLEADINGS AND PROOF—VARIANCE—TITLE TO MONEY. Under an information charging robbery by the taking of a certain sum of money belonging to the prosecuting witness, evidence that part of the money taken belonged to him is sufficient proof of title to sustain a conviction.

SAME—INFORMATION—ALLEGING ASPORTATION. An information for robbery charging the offense in the language of the statute is sufficient without alleging asportation other than by stating that the accused took the property from the person of the prosecuting witness.

Appeal from a judgment of the superior court for Yakima county, Rudkin, J., entered December 21, 1904, upon a trial and conviction of the crime of robbery. Affirmed.

E. B. Preble and *D. L. Crowder*, for appellant.

FULLERTON, J.—The appellant was convicted of the crime of robbery, and appeals from the judgment and sentence pronounced against him.

¹Reported in 82 Pac. 918.

It is first contended that the evidence was insufficient to justify the verdict; the precise objection being that three persons were arrested and accused of the robbery, while the evidence showed that only two of the three participated therein, and failed to show which two of the three it was that so participated. But as we read the record, the evidence shows that all three of the accused had an active part in the commission of the crime. It is true that the prosecuting witness, when detailing the circumstances of the crime, sometimes referred to the individual of whom he was speaking by gesture, or by saying, "that man," or "that man there;" and that the record, as brought here, does not, in each instance, make it clear to whom he had reference, but this is not fatal to the judgment. This court examines the evidence for the purpose only of ascertaining if there was competent evidence introduced at the trial from which the jury were warranted in finding the verdict they returned. In this case, we find such evidence aside from that part containing the uncertain references.

The information charged that the money the defendants were accused of taking was the personal property of one John Malasett, the prosecuting witness. Malasett's testimony was to the effect that the defendants robbed him of \$37.25, \$7 of which he earned picking hops, and \$30.25 of which he won by gambling. The appellant contends that there was a fatal variance between the allegations and the proof in respect to the ownership of the property; because, he argues, title to property won by gambling is in the person from whom it was won, and not in the winner. But if we were to concede that the prosecuting witness had no title to that part of the money taken from him which he won while gambling, still the case would not fail. It was shown that \$7 of the money taken was his legitimately. This is sufficient to sustain the conviction. To fail to prove the allegations of the information precisely as laid is not fatal. It is

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sufficient if the substance of the allegations be proven, and to prove that any part of the money taken was the property of the person alleged to be the owner, is to prove the substance of that issue.

The information charges that the defendants "did . . . forcibly and feloniously take from the person" of the prosecuting witness certain property, but does not allege that they "carried away" the property so taken, and it is contended that this is a fatal defect entitling the appellant to a reversal. There is no merit in this contention. The information follows the language of the statute, and asportation is sufficiently alleged by the allegation that the defendants took the property from the person of the prosecuting witness. The cases where this precise question has been determined are not many, but the only one called to our attention which supports the appellant's contention is *Commonwealth v. Clifford*, 8 Cush. 215. There it was held that an information failing to allege that the property taken was carried away is fatally defective. But other states where the question was squarely raised, have declined to follow the rule. See, *Terry v. State*, 13 Ind. 70; *Thompson v. State*, 35 Texas Cr. Rep. 511, 34 S. W. 629; *Keeton v. State*, 70 Ark. 163, 66 S. W. 645. This court, also, in *State v. Johnson*, 19 Wash. 410, 53 Pac. 667, approved an information for robbery where the asportation was charged in the language used in the present information; the precise question, however, seems not to have been called to the attention of the court. So the supreme court of California, in *People v. Walbridge*, 123 Cal. 273, 55 Pac. 902, on the appeal of the state, reversed a judgment holding an information insufficient where the asportation was charged in the language used in the information before us. In this case, like the one from this court, the precise question was not discussed, but it would seem that the question would not, in either case,

have escaped the attention of both court and counsel, had it been deemed material.

The judgment is affirmed.

MOUNT, C. J., CROW, ROOT, DUNBAR, and HADLEY, JJ.,
concur.

[No. 5742. Decided December 7, 1905.]

J. F. IRBY *et al.*, Respondents, v. W. H. PHILLIPS,
Appellant.¹

APPEAL—REVIEW—VERDICT. The verdict of a jury upon conflicting evidence which is sufficient to support the judgment will not be disturbed on appeal.

PLEADING AND PROOF—VARIANCE—AMENDMENTS CONSIDERED MADE. Where the entire controversy was before the court and jury, and there was no claim that appellant was misled or prejudiced, a variance between the pleading and proof going only to the amount of the recovery, is immaterial, and necessary amendments will be considered as made.

Appeal from a judgment of the superior court for Franklin county, Rudkin, J., entered December 23, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

O. R. Holcomb, for appellant.

Zent & Lovell, for respondents.

HADLEY, J.—This action was brought to recover the alleged contract price for drilling a water well. The complaint alleges, that the contract was a verbal one, by which it was agreed that plaintiffs should drill a well upon the defendant's farm, and that the defendant should pay therefor the sum of \$2 per foot for the first two hundred feet of depth, and \$2.25 for each foot in excess of two hundred feet; that the plaintiffs, for said price, guaranteed that they would drill

¹Reported in 82 Pac. 931.

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a depth of three hundred feet, but that the guaranty extended no farther; that, in addition to the amounts to be paid for the drilling as aforesaid, the defendant was to move the drilling outfit to the place of drilling and furnish the necessary fuel and water to operate the drilling machinery, all at his own expense; that pursuant to said agreement, the plaintiffs drilled a well to the depth of seven hundred and six feet, when the defendant ordered them to cease drilling; that the plaintiffs were ready and willing to continue the drilling to a greater depth, but that the defendant refused to permit them to do so. Judgment is demanded for \$1,538.50.

The answer alleges that the agreed price was fifty cents per foot in earth, and \$2 per foot in rock, for the first two hundred feet, and \$2.25 per foot for all in excess of two hundred feet; that, if plaintiffs failed to obtain water sufficient for defendant's purposes, the amount to be paid was one-half of the above rates per foot for the total depth drilled, provided they should drill as long as required or desired by defendant, and that plaintiffs were to drill until they obtained a sufficient quantity of water, or until required by defendant to cease. It is alleged that plaintiffs ceased drilling without any directions from defendant that they should do so, and without his consent, and contrary to his desires.

We believe the foregoing sufficiently states the material points in the pleadings. What is alleged concerning the agreement to deduct the amount for any well abandoned before reaching a depth of three hundred feet is not pertinent now, inasmuch as the well over which the controversy arises was not so abandoned. The cause was tried before a jury, and a verdict was returned in favor of the plaintiffs in the sum of \$806.05. Judgment was entered for the amount of the verdict, and the defendant has appealed.

Appellant assigns a number of errors but, as stated in his brief, the seventh assignment practically includes all the others. That assignment is to the effect that the verdict

is contrary to the law and the evidence, and that the motion for a new trial should have been granted. The testimony for respondents concerning the contract was to the effect that, if they were unable for any reason to reach a depth of three hundred feet, and had not obtained water, they were to receive no pay; but that, if they drilled a greater depth than three hundred feet, they were to receive pay for the entire distance drilled. The testimony for appellant was to the effect that the drilling was to continue until water was reached, or until appellant should direct that the drilling be discontinued, in which event, if water was not found, the price to be paid should be one-half of the rates named. There was evidence to the effect that appellant declined to further furnish fuel and water for respondents' use in drilling, and that for that reason they were compelled to cease the work. The court instructed the jury that, if they found the contract to be that respondents were to drill until they found water, then they could not recover; but if, upon the other hand, they found that respondents were to drill at so much per foot, and did not agree to get water, then they were entitled to recover one-half the amount claimed. The instruction that recovery could in no event be had for more than one-half the amount claimed was in appellant's favor, and no exceptions were taken to other features of the instructions. The issue was thus clearly defined by the instructions, and the jury, having the evidence before them, found for respondents, and they must therefore have found that respondents were to be paid for the whole distance drilled, whether water was found or not. While the testimony conflicts, yet there is evidence in support of the verdict, and we believe the court did not err in refusing to set it aside for insufficiency of evidence.

Appellant argues that there was a fatal variance between the averments of the complaint and the proofs, and that he was, for that reason, entitled to a directed verdict in his favor. We do not believe there was such fatal variance. The averments of the complaint were sustained by the proof, except

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perhaps in the particular that the amount to be paid was one-half the rates named in the event water was not found. This, however, related only to the amount of recovery, and did not negative the right to recover in some amount. In any event, the parties had fully stated, both in the pleadings and evidence, their respective views of the contract, and of what was done thereunder. The entire controversy was before the court and jury. There was no showing that appellant was in any way prejudiced or misled. It was, therefore, proper for the court to direct the facts to be found according to the evidence. Bal. Code, § 4950. See, also, *Olson v. Snake River Valley R. Co.*, 22 Wash. 139, 60 Pac. 156. The respondents were entitled to amend the complaint to correspond with the proofs, and in such case this court will, on appeal, consider such amendment as made. *Richardson v. Moore*, 30 Wash. 406, 71 Pac. 18; *Allend v. Spokane Falls etc. R. Co.*, 21 Wash. 324, 58 Pac. 244.

Under the record as presented, we find no reversible error, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 5899. Decided December 7, 1905.]

JOHN F. FIRCH *et al.*, Respondents, v. ANDREW HACKETT *et al.*, Appellants.¹

ACCOUNTING — CONTRACT TO LOCATE MINING CLAIMS — CONSTRUCTION. Where the defendant made a contract with the plaintiffs to make a certain trip and locate certain coal claims, and share with them equally whatever money or interest he should receive from a contract made with one H, whereby defendant had agreed to locate the claims in the interest of H and himself, and the claims located by the defendant were thereafter rejected and the contract abandoned by H, without fault on the part of the defendant, the plaintiffs are not entitled to any accounting from the defendant as to his interests in the claims located, or other claims or interests acquired in connection with defendant's said trip or subsequent transactions.

¹Reported in 82 Pac. 919.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 17, 1905, upon findings in favor of the plaintiffs, after a trial on the merits, in an action for an accounting. Reversed.

L. H. Prather, for appellants.

RUDKIN, J.—On the 11th day of June, 1902, the defendant Hackett and one A. D. Hopper entered into the following agreement:

“Whereas, Mr. A. Hackett represents that he possesses information as to the location of coal lands in East Kootenay, close to, and available from line of, the Great Northern Ry., such land being now open to entry or acquirement from the Canadian Government; whereas, A. D. Hopper, representing the Spokane Falls Gas Light Co., is desirous of obtaining such land: It is hereby agreed that Mr. A. Hackett, for and in consideration of one hundred and fifty dollars (\$150), the receipt of which is hereby acknowledged, agrees to locate properly and according to law, in such names as said Hopper desires, such sections of coal land in the most available sections of land that is open for entry in said section. Mr. A. D. Hopper hereby agrees to deliver to the said Mr. A. Hackett the sum of one thousand dollars (\$1,000), in cash, and one-half interest (forty-nine per cent), in the property or company that may be organized to work and improve the same. The money to be paid at such a time as said A. D. Hopper may legally acquire the title to such locations as may be made in his behalf by said Hackett. He further agrees to advance the necessary license fee of fifty dollars (\$50) per section and all necessary government expenses, as also to pay the rental for five years on all the land so located, if such land is not purchased outright.

“In witness whereof we have each signed below as agreeing to the foregoing. Andrew Hackett, A. D. Hopper.

“Witness: John F. Firch.”

Immediately thereafter, and on the same day, the defendant Hackett and the plaintiffs Firch and Belden entered into the following agreement:

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"We, the undersigned, agree to the following, to wit: That Mr. Andrew Hackett shall go into British Columbia, along the line of the new cut-off of the Great Northern Railroad, to the town of Fernie and coal fields along said railroad, or such other place or places in British Columbia most convenient to above-named railroad, and locate from one to ten sections of good coking coal, properly stake and locate the same in accordance with the laws of British Columbia, and to do all things necessary to properly locate such coal lands for ourselves, and shall also use such other names as may be agreed upon by and between us for the purpose of making a deal with Mr. Albert Hopper, treasurer and superintendent of the Spokane Falls Gas Light Company, or any one else we may choose to make a deal with on all coals located by Mr. Andrew Hackett, or others for him, in British Columbia. It is further agreed that whatever money or interests the said Andrew Hackett shall receive from the said Albert D. Hopper, or said Gas Light Co., he will and shall divide share and share alike with John F. Firch and Worth Belden, on account of the trip upon which he leaves this 11th day of June, 1902. (Signed) Andrew Hackett, John F. Firch, Worth Belden."

Upon the execution of these contracts, the defendant Hackett repaired to the place designated therein, and located sixteen coal claims, containing 640 acres each, in names furnished him and agreed upon by the parties. He returned to the city of Spokane, where the contracts were entered into, and where all the parties resided, on or about the 17th day of July, 1902. In the latter part of July, or the early part of August, 1902, Hopper, accompanied by one Archie Patrick, visited the claims located by the defendant Hackett for the purpose of inspecting the same. Hopper rejected the locations, after such inspection, and soon thereafter left the state and absented himself therefrom for a year and a half. The matter ends here, so far as concerns Hopper and the Spokane Gas Light Company. Thereafter the defendant Hackett made several trips into British Columbia, and located, and assisted in the location of, three groups of claims,

containing 320 claims in all, for which services he is alleged to have received considerable sums in money and stocks, and to have acquired a number of claims or licenses in his own right.

This action was brought by the plaintiffs, against the defendant Hackett and others, for an accounting, the plaintiffs claiming a one-half interest in all moneys and stocks received by the defendant Hackett, and in all claims and licenses held by him, under and by virtue of the contract above set forth. The court below found in favor of the plaintiffs, appointed a receiver to take charge of, receive and collect all moneys due the defendant Hackett, and all claims, licenses, and stocks owned or claimed by him, arising from or growing out of the location of the said several claims, ordered a reference to take an accounting between the parties, and directed a judgment in favor of the plaintiffs, and against the defendant Hackett, for all sums found due on such accounting. From this judgment, the defendants have appealed to this court.

There is little or no controversy between the parties as to the principal facts contained in the foregoing statement, but beyond this, the testimony is in hopeless conflict. The respondents claim that they were possessed of exclusive knowledge as to the location of the coal lands in controversy, prior to the above negotiations. The appellant Hackett, on the contrary, claims that such knowledge was derived from him. The respondent Firch claims that he was a party to the first contract above set forth, though he signed the same as a witness only. His contention in this regard finds no support in the record. The appellant Hackett claims that the respondent Firch received one-half of the \$150 paid by Hopper on the execution of said contract. Firch, on the other hand, claims that he received but \$20. The respondents claim to have advanced considerable sums of money to the appellant Hackett, on account of said contracts, and the appellant

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Hackett claims that no such advancements were made. On this point the testimony is extremely contradictory and unsatisfactory.

But from the view we take of the contract between the parties, their rights are determined by the admitted facts. This is an action for an accounting, and the respondents are only entitled to relief as to such moneys, stocks, claims and licenses, as they and the appellant Hackett have a joint interest in under their contract. The contract upon which the action is based is plain and unambiguous in its terms. Neither fraud nor mistake in its execution is alleged or proved. What, then, are the rights of the respondents under that contract? The contract itself answers this question in the following unmistakable language:

"It is further agreed that whatever money or interest the said Andrew Hackett shall receive from the said Albert D. Hopper, or said Gas Light Co., he will and shall divide share and share alike with John F. Firch and Worth Belden on account of the trip upon which he leaves this 11th day of June, 1902."

There is nothing in the contract to indicate that the parties thereto were jointly interested in anything except the Hopper contract. Beyond this, the respondents are not entitled to an accounting, and have no just claim to moneys, stocks, claims or licenses, received by the appellant Hackett from other sources, or from contracts with other parties. If the appellant Hackett failed to perform his contract in other respects, the respondents have their remedy at law in an action for damages, but there is nothing in the contract to warrant the conclusion that the respondents had a joint interest with the appellant in other enterprises or undertakings, aside from the Hopper contract, nor can this court so hold. Inasmuch as the respondents were only interested in the money and stocks involved in the Hopper contract, and under the admitted facts that contract was abandoned with-

out fault on the part of the appellant Hackett, it follows that the judgment of the court below is erroneous, and the same is reversed, with directions to dismiss the action.

MOUNT, C. J., FULLERTON, ROOT, DUNBAR, and HADLEY, JJ., concur.

[No. 5688. Decided December 7, 1905.]

THE SNOHOMISH LAND COMPANY, *Respondent*, v.
A. S. BLOOD *et al.*, *Defendants*, and NICHOLAS
SCHLUNGS, *Petitioner, Appellant*.¹

ACTIONS — COMMENCEMENT — FILING OF COMPLAINT — MISTAKE OF CLERK. Although the clerk of court by mistake failed to indorse or enter a complaint when tendered for filing, the tender would seem to be a sufficient filing to sustain the jurisdiction of the court.

JUDGMENT—JURISDICTION—FAILURE TO FILE COMPLAINT. A judgment is not void for want of jurisdiction because of the failure to file the complaint.

JUDGMENT — VACATION — FRAUD OF COUNSEL — EVIDENCE — SUFFICIENCY. An attorney is not shown to be guilty of fraud in making a defense for the purchaser under a void tax lien foreclosure, by reason of failure to assert a claim for the value of improvements made after the sale, where it appears that the matter was discussed with his client and dropped because of the small value of the improvements.

JUDGMENT—VACATION—ERRORS OF LAW. A judgment should not be vacated for mere errors of law after the expiration of the time for an appeal.

Appeal from an order of the superior court for Snohomish county, Denney, J., entered January 7, 1905, refusing to vacate a judgment, after a hearing on the merits. Affirmed.

Nicholas Schmitt, for appellant,

Bell & Austin, for respondent.

FULLERTON, J.—In May, 1903, the respondent began the above entitled action against the defendants, to quiet title

¹Reported in 82 Pac. 933.

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in itself to eighty acres of land, situated in Snohomish county, to which the defendants were making adverse claims. The defendant Nicholas Schlungs alone appeared and defended. He set up title in himself by virtue of a deed acquired in a tax foreclosure proceeding, at the sale under which he became the purchaser. The respondent, in its reply, set up matters tending to show that the proceedings on which Schlungs relied were invalid; alleging, further, that it had theretofore tendered him the amount the assessment rolls showed he had paid as taxes, with interest, and offering to pay any such sum as the court should find to be due him on account of taxes paid by him on the property in dispute. A trial was had on these issues, at which the court held the tax deed invalid, found that Schlungs had paid a definite sum as taxes, and adjudged that the respondent pay the amount thereof into court for him, and that thereupon the respondent's title to the land be quieted. The money was paid into court, and afterwards withdrawn by Schlungs' attorneys and tendered him. He, however, refused to accept the amount paid, and it was retained by the attorneys awaiting his order at the time of the trial.

Some nine months after the judgment was entered, Schlungs employed other counsel, and instituted this proceeding to set the judgment aside. In the petition to vacate, he alleges, first, that the judgment is void; next, that if not void, it is erroneous; and, lastly, that it was obtained by collusion between his former counsel and the plaintiff in that case, respondent here, by which he was defrauded of his interests in the property. He alleged, also, that he was foreign born, having but an imperfect acquaintance with the English language, and was unable to understand the proceedings sufficiently to protect himself against the fraudulent acts of his counsel. The trial court denied the application, and this appeal is taken therefrom.

The reason assigned for the first contention is that the record fails to show that the complaint was filed with the

clerk of the court on or before the day the cause was called for trial. On this point, the court found that the complaint was tendered for filing, and left with the clerk at the proper time, but that the clerk omitted to place the customary file marks thereon, or record the filing in the appearance docket. It would seem that, if it were necessary to file the complaint in order to give the court jurisdiction to enter a judgment in the cause, that the act of the plaintiff shown here would be a sufficient compliance with the requirement. But we cannot hold that, were there a total omission in this regard, the judgment would be void. Should a defendant object to proceeding with a case until the complaint is filed, and should the trial court overrule that objection, this ruling might, owing to the somewhat peculiar requirements of our statute, be error sufficient to reverse the case on appeal (*Ashcraft v. Powers*, 22 Wash. 440, 61 Pac. 161); but this is the extent of the rule. Since an action can be commenced without the filing of a complaint, it may proceed to judgment without such filing, and a judgment entered thereon is not void, however erroneous it may be.

The judgment not being void, the appellant was not entitled to have it vacated unless he showed it to be erroneous, and that it was obtained in the manner alleged in his petition to vacate it. On the question of fraud on the part of his counsel, there was no proof whatever. It appears that his counsel not only acted in good faith towards him, but that they made all proper defenses, and failed only because the trial court disagreed with them as to the law of the case. True, it is complained now that the appellant had made improvements on the land, while holding under his tax deed, on the faith of his title, and that he was entitled to be paid for these improvements as a condition precedent to a vacation of the tax sale, and that no claim was made for the value of these improvements in the answer. But if this were a cause for vacating the judgment, a question we do not decide, it appears that this matter was taken up with the ap-

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pellant before the answer was filed, and it was agreed that these improvements were not of sufficient value to make them worthy of a contest. This being true, there could be no fraud or neglect on the part of his counsel for failing to make the claim.

The other grounds urged for vacating the judgment are equally untenable. The trial court found, and the record sustains the finding, that the appellant was not hampered in his defense by any want of familiarity with the English language; and the claim that the judgment is erroneous, even if well founded, is not, standing alone, a ground for vacating it. For mere error, the statute of appeals furnishes an ample remedy, and appeal must be resorted to for its correction.

The order appealed from is affirmed.

MOUNT, C. J., RUDKIN, CROW, DUNBAR, and HADLEY, JJ., concur.

[No. 5915. Decided December 8, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. ANTON MICHAEL ILOMAKI, *Appellant*.¹

CRIMINAL LAW—PLACING WIFE IN HOUSE OF PROSTITUTION—PLEADING—INFORMATION—DUPLICITY—STATUTES—CONSTRUCTION. An information charging the crime of placing a wife in a house of prostitution and allowing and permitting her to remain in such house, is not bad for duplicity, since any one or all of the series of acts constituting the crime may be charged in a single count and constitute but one offense.

SAME — TRIAL — EXCLUDING WITNESSES FROM COURT ROOM—WITNESSES DISOBEYING ORDER. It is not error to permit witnesses to testify who for a short time disobeyed an order of court excluding the witnesses from the court room, where no collusion was shown between the witnesses and the prosecution.

¹Reported in 82 Pac. 873.

APPEAL—ASSIGNMENT OF ERROR—SPECIFICATION IN BRIEF OF ERRORS ASSIGNED. The brief on appeal must specifically point out the errors alleged and refer to the record where the same can be found, in order to secure a review of the error assigned.

CRIMINAL LAW—HOUSE OF PROSTITUTION—KNOWLEDGE OF DEFENDANT—GENERAL REPUTATION—EVIDENCE. Upon a prosecution for the crime of placing a wife in a house of prostitution, evidence of the general reputation of the house is proper, the court instructing the jury that the defendant must be shown to have known that it was a house of prostitution.

SAME—CONSENT OF HUSBAND—GOOD FAITH OF PROTESTS. Upon a prosecution for the crime of placing a wife in a house of prostitution where defendant claims to have protested against his wife's going or remaining there, it is proper to instruct that such protests must have been *bona fide* and not made merely for a defense, especially where the wife actually remained there and the accused lived with her at such place.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered June 5, 1905, upon a trial and conviction of the offense of placing a wife in a house of prostitution. Affirmed.

Agnew & Israel, for appellant.

E. E. Boner, for respondent.

MOUNT, C. J.—Appellant was convicted, under Laws 1903, page 230, § 1, of the crime of placing and leaving his wife in a house of prostitution, knowing the house to be such. He appeals from a judgment on a verdict of conviction, and alleges error of the trial court, first, in overruling a demurrer to the information. The information charges that,

“The said Anton Michael Ilomaki, on the 29th day of March, 1905, in the county of Chehalis, in the state aforesaid, then and there being the husband of one Sofia Ilomaki, did then and there unlawfully, wilfully and feloniously connive at, and consent to, the placing and leaving of his said wife, Sofia Ilomaki, in a house of prostitution, and then and there give his full consent, and knowing said house to be a house of prostitution, did wilfully and feloniously allow and permit his said wife, Sofia Ilomaki, to remain therein; said

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house of prostitution being known and designated as No. 411 East Hume Street."

It is claimed that this information is bad for duplicity, under Bal. Code, § 6044, because it charges that the appellant consented to the placing of his wife in a house of prostitution, and also that he allowed and permitted her to remain in such house. But it will be seen, by an examination of the statute, that it enumerates a series of acts any one or all of which may constitute a crime. In such case it is held that all of such acts may be charged in a single count because, while each act alone may constitute an offense, all of them together do no more than constitute one and the same offense. *State v. Newton*, 29 Wash. 373, 70 Pac. 31. Under this rule it was not error to overrule the demurrer.

(2) At the beginning of the trial, all the witnesses were sworn, and an order was made excluding them from the court room during the progress of the trial. Three witnesses for the state took seats within the court room for some reason not shown, and remained during a part of the examination of the prosecuting witness. They were thereupon noticed and required to depart. When these witnesses were afterwards called to the stand, counsel for appellant objected to their testimony being received because they had disobeyed the order of the court. There was no showing of, nor attempt to show, any collusion with the witnesses, or any fault on the part of the prosecution. The court denied the objection and received the evidence of these witnesses. This ruling is assigned as error. Under the rule in *State v. Lee Doon*, 7 Wash. 308, 34 Pac. 1103, there was no error in receiving the evidence of these witnesses.

(3) Appellant alleges that the court erred in failing to instruct the jury that they must not consider evidence which the court had stricken out of the case. The record does not disclose that any such instruction was requested and refused. Furthermore, the assignment of error upon this point refers to certain pages of the statement of facts. These references

only show that objections were sustained to certain questions. They do not show that any evidence improperly admitted was stricken out. The argument in the brief upon this point is general, and fails to point out any specific evidence which may have been improperly considered by the jury, or any specific evidence which was stricken where the court failed to instruct the jury not to consider it. The duty rests upon appellant to point out errors specifically. The court is not required to search for them.

(4) Appellant contends that the court erred in instructing the jury upon the question of knowledge of the accused that the house was a house of prostitution. The instructions show that the court very plainly and properly told the jury that "every material allegation in the information must be proved beyond a reasonable doubt." In speaking of the question of the character of the house, and of the wife of the accused being there, the court used this language:

"You must be satisfied that he consented to it, or that he wilfully permitted her to remain there, knowing that it was a house of prostitution, . . . and also that it was a house of prostitution."

The court fully and fairly instructed the jury upon this point. There was no error in permitting evidence of the general reputation of the house. Appellant attempted to maintain that he did not know the character of the house. The evidence, however, clearly shows that the house was a house of prostitution, and generally regarded as such. These facts were proper to go to the jury to show that appellant also knew the character of the house.

(5) Appellant further claims that the court erred in instructing upon the question of the efforts of appellant to get his wife to leave the house. The court said upon this question:

"Now, as to whether or not he consented to her being there, or permitted her to remain there, if she was there, and if he knew that it was a place of that kind, and that she was there,

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it must be by his consent or by his permission. His consent need not be expressed. He may consent without giving any express permission or expressly giving his consent for her to remain there. But if she stayed there against his protest, against his wish, and he tried to get her to leave the place, then he would not be guilty."

The court followed this by saying, in substance, that such protests must be *bona fide*, and if the jury found that protests were made to his wife by the accused, and were not mere pretenses, he would not be guilty. These instructions, we think, correctly gave the law to the jury upon the question. No other safe rule could be followed. If appellant did actually protest against his wife remaining in such a place, and such protests were merely for a defense in case of prosecution under the statute, and were not to be complied with, and were so understood by the wife, such protests were a nullity and would not negative the consent which was manifested by the fact that the wife actually remained there, and by the further fact that the appellant during all the time actually lived with her at such place. If a protest not in good faith may be a defense in such cases, the statute is rendered nugatory. The error alleged upon the instruction defining reasonable doubt is wholly without merit.

Finding no error in the record, the judgment appealed from is affirmed.

ROOT, DUNBAR, HADLEY, FULLERTON, RUDKIN, and CROW, JJ., concur.

[No. 5769. Decided December 8, 1905.]

J. M. DENNY, *Appellant*, v. J. W. KLEEB, *Respondent*.¹

MASTER AND SERVANT — NEGLIGENCE — INJURY TO SERVANT PILING LUMBER — CONTRIBUTORY NEGLIGENCE — FELLOW SERVANTS — NONSUIT. An employee who is injured by the falling of lumber piled by himself and by two fellow servants, is guilty of contributory negligence and assumes the risk, where it appears that he was experienced and was as capable of realizing the danger as the foreman, who had nothing to do with piling the lumber further than to direct the plaintiff where to do his work.

APPEAL—REVIEW—ERROR CURED BY VERDICT. In an action for personal injuries, error in refusing to give instructions as to the burden of proving plaintiff's contributory negligence is harmless, where the jury by special verdict find that the defendant was not guilty of negligence.

APPEAL—REVIEW—HARMLESS ERROR AS TO EVIDENCE. In an action for personal injuries, cross-examination of the attending physician showing that the defendant paid for his services, although on his examination in chief the witness gave no testimony as to his charges, is not error prejudicial to the plaintiff, where by a special verdict the jury found the defendant not guilty of any negligence.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered December 29, 1904, upon the verdict of a jury rendered in favor of the defendant after a trial on the merits, in an action for personal injuries sustained by a mill employee through the falling of a pile of lumber. Affirmed.

Maurice A. Langhorne and *R. W. Ruffin*, for appellant.

H. W. B. Hewen and *Charles E. Miller*, for respondent.

CROW, J.—Action by appellant, plaintiff below, to recover damages for personal injuries. From a judgment in favor of the defendant, respondent here, this appeal has been taken.

Appellant, J. M. Denny, for a period of about eight months, had been an employee of respondent, J. W. Kleeb,

¹Reported in 82 Pac. 920.

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who was the owner of, and operating, a sawmill at South Bend, in Pacific county. In connection with said mill, respondent maintained a certain dry shed, which is conceded to have been substantial, well built, and adapted to the purpose of storing lumber, placed in large piles therein, and separated according to sizes and grades. There were three alleys running through said shed, each about fifteen feet in width. On January 31, 1903, appellant and two fellow servants were assorting and piling six-inch boards in the middle alley. While so employed, said lumber fell upon appellant, inflicting serious injuries.

The complaint, in substance, charged respondent with negligence, in that the lumber which fell upon appellant had been piled at the instance, and under the direction, of one Hagan, respondent's foreman; that appellant had complained to Hagan, telling him there was insufficient space within which to pile the identical lumber that afterwards fell; that, on the afternoon of the day of the accident, he again called Hagan's attention to the lumber, stating he was afraid it would fall, but was assured by Hagan that it was perfectly safe; that, relying on these assurances, he continued work until he was injured; that the respondent was negligent in not providing him with a safe place in which to work, negligent in compelling him to work in a small, cramped, and narrow space, and negligent in assuring him there was no danger.

Respondent, by his answer, denied all said allegations of negligence, and affirmatively pleaded assumption of risk, contributory negligence, and that the injuries were caused by the acts of appellant's fellow servants. These affirmative allegations were denied by the reply. On the trial it was conceded, that the dry shed was a good, substantial, and proper structure for the purpose for which it was used; that appellant had worked at assorting and piling lumber therein for about eight months prior to the accident; and that the particular pile of lumber which fell was constructed by him-

self and two fellow servants. A verdict was returned in favor of respondent, and judgment was entered thereon.

Appellant contends that the trial court erred, (1) in refusing to charge the jury that the burden of proof was on respondent to establish the several affirmative defenses made by him, to wit, assumption of risk, contributory negligence, and negligence of fellow servants; (2) in giving certain instructions requested by respondent, and also given by the court of its own motion; (3) in refusing to sustain objections to certain questions propounded to one of appellant's witnesses on cross-examination.

The record shows certain interrogatories which were propounded to, and answered by, the jury, as follows:

"(1) Did the defendant furnish a substantial building, having a solid and safe floor, for plaintiff to pile lumber in? Answer: Yes. (2) Was the lumber furnished plaintiff to pile of the usual and ordinary character? Answer: Yes. (3) Was it the duty of the plaintiff to pile lumber, in the defendant's dry shed, in a careful and safe manner? Answer: Yes. (4) Did the defendant or his foreman, or either of them, give plaintiff and the men working for him, any instructions about piling lumber, except that it must be done in a safe and careful manner? Answer: No. (5) Was foreman Hagan's attention, at any time, called to the pile of lumber which fell on plaintiff, by any person? Answer: No. (6) Were the plaintiff's fellow servants reasonably careful and competent workmen for piling lumber? Answer: Yes."

The trial judge instructed the jury that the burden of proof was upon appellant to show acts of negligence on the part of respondent, as alleged in the complaint, but failed to instruct that the burden of proof was on respondent to sustain his affirmative defenses of assumption of risk, contributory negligence, and negligence of fellow servants, although such charges were requested by appellant before the jury retired. Conceding this to have been error, the question arises, was such error prejudicial?

Respondent, at the close of appellant's case, moved the

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court for a nonsuit, which motion was denied, the trial judge at the time saying: "I think I shall submit it to the jury on proof, rather than take chances on error now by granting a nonsuit." Again, at the close of all the evidence, respondent moved the court to instruct the jury to find a verdict in his favor, which motion was also denied. Respondent now contends that his motion for a nonsuit should have been granted; or, if not, that his motion for a directed verdict was well taken, and that, if he is right in either of these contentions, the charges given or refused by the court, even if erroneous, became immaterial and do not constitute prejudicial error, the verdict of the jury being the only one that could be reached under the evidence. Respondent further contends that, even though his positions as above stated are not well taken, the judgment should be affirmed without regard to the instructions given or refused, by reason of the special findings made by the jury in their answers to the special interrogatories propounded to them by the court.

We think respondent's contention should be sustained. In our opinion he was entitled to a nonsuit, for even though it be conceded that appellant complained to Hagan, who directed him to proceed with the work, assuring him there was no danger, yet the evidence clearly shows the lumber was piled exclusively by appellant and his fellow servants, in such manner as they themselves determined, and that, if it was not properly piled, the negligence was that of the appellant himself, and his fellow servants, for which the master was not liable. It also appears, that appellant was an experienced man, forty years of age; that he had been engaged in this work for a period of eight months or more; that he was as capable of seeing and realizing any danger as was Hagan; that, if any danger existed, he knew it and, by continuing his work, assumed the risk. There is not evidence sufficient to show that Hagan had any knowledge superior to that of appellant, or that he had anything whatever to do with the

piling of the lumber, further than to direct respondent where to do his work.

Assuming, however, that respondent was not entitled to a nonsuit, yet it having been conceded that the dry shed was a safe, substantial, and proper structure, no negligence could be charged against respondent unless such negligence arose by reason of some act of himself or of his foreman Hagan. No personal act of negligence is shown on his part, and the special findings negative any such acts on the part of Hagan. These findings could have been in no way dependent upon, or caused by, the action of the court, either in refusing instructions requested, or in giving those excepted to by appellant, but are clearly warranted by the evidence. The jury having found respondent not guilty of negligence, the question of the existence or non-existence of contributory negligence on the part of appellant became immaterial, and any failure of the court to instruct the jury as to the burden of proof did not constitute prejudicial error, for appellant could in no event recover in the absence of any showing of negligence on the part of respondent. A judgment will not be reversed because of error in giving or refusing instructions, when the verdict rendered is manifestly right and in accordance with the evidence. In other words, errors growing out of a charge are always to be disregarded when the verdict is so plainly in accordance with the evidence that it follows as a conclusion of law thereon. *Davis v. Gilliam*, 14 Wash. 206, 44 Pac. 119; *Secor v. Oregon Improvement Co.*, 15 Wash. 35, 45 Pac. 654. In *Kellogg v. Cook*, 18 Wash. 516, 52 Pac. 233, this court said:

“We have carefully examined and considered the evidence given at the trial, and as a result we are unanimously of the opinion that the verdict was right, and that the judgment entered upon it must be affirmed, without regard to whether technical error was committed by the court in charging the jury. The rule established in this state—and generally followed elsewhere—is that ‘a judgment will not be

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reversed because of error in giving or refusing instructions, when the verdict rendered is manifestly in accordance with the evidence.' ”

Appellant in his complaint has included, as one of his items of damage, the sum of \$140 for treatment which became necessary on account of his injuries. Dr. Martin, a witness on behalf of appellant, was the physician who had attended him. On his examination in chief he gave no testimony as to charges made by him. The respondent, on cross-examination, was permitted, over appellant's objection, to show that Dr. Martin had treated appellant at the instance and direction of respondent, who had paid for his services. We fail to see any prejudicial error in permitting this cross-examination.

The judgment is affirmed.

MOUNT, C. J., ROOT, DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 5779. Decided December 11, 1905.]

ANDREW JACKSON COLLIER, *Appellant*, v. GREAT NORTHERN RAILWAY COMPANY *et al.*, *Respondents*.¹

RAILROADS—NEGLIGENCE—DEFECTIVE TRACKS—OWNERSHIP—OTHER RAILROAD. Where two railroad companies own parallel tracks along a city street, each making occasional use of the tracks of the other for the purpose of switching cars, the duty to keep the tracks in safe condition for public travel devolves upon the party having dominion and control over them; and one company is not liable while thus using the tracks of the other for the results of a collision with a wagon, not due to want of care on its part, but to the defective condition of the tracks of the other company.

APPEAL—REVIEW—QUESTIONS DETERMINED. In an action for negligence in the maintenance of railroad tracks, where the evidence as to the nature of the defect is not brought up on appeal, the supreme court cannot determine the applicability of Laws 1899, p. 49, requiring railroads to adopt certain precautionary measures in the care of its tracks.

¹Reported in 82 Pac. 935.

PLEADINGS—ANSWER—ADMISSIONS. Where two railroads owned tracks on a certain street and the complaint alleged that one company operated trains at a certain point on the east side of said street, an answer denying all the allegations of the complaint except that the company operated trains on said street, does not admit that it operated trains on the tracks of the other company.

Appeal from a judgment of the superior court for King county, Griffin, J., entered December 27, 1904, upon the verdict of a jury rendered in favor of the defendants, after a trial on the merits, in an action for injuries sustained by a traveler crossing railroad tracks. Affirmed.

S. H. Steele, for appellant.

L. C. Gilman, for respondents.

RUDKIN, J.—Railroad avenue, between Yesler way and Washington street, in the city of Seattle, is one of the public thoroughfares of said city, but is largely used for railroad purposes. The Northern Pacific Railway Company and the Great Northern Railway Company own, operate, and control several tracks along said avenue between the above points. The tracks owned by each company are under its exclusive dominion and control, and are only used by the other company in the manner and for the purpose hereinafter stated. Whenever it becomes necessary to transfer freight cars from the tracks of one company to the tracks of the other, such transfer is made by means of a switch which connects the tracks of the two companies. Such transfer is sometimes made by the employees of one company, and sometimes by the employees of the other. Except for the purpose of effecting such transfer, neither company uses, or has any control over, the tracks of the other.

On the 7th day of August, 1903, the plaintiff was driving his horse and wagon diagonally across said Railroad avenue, and as he crossed one of the tracks of the Northern Pacific Railway Company, the wheel of his wagon dropped into a hole in said track, from two to eight inches wide, twelve

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inches long, and ten inches deep, resulting from a failure to block and securely guard the rail on said track, and became fast. While the plaintiff was endeavoring to release his wagon, a locomotive owned by the defendant Great Northern Railway Company, operated by the defendant Monohan, and engaged in transferring freight cars as above set forth, ran into the plaintiff, destroyed his wagon and harness, and injured the plaintiff himself. This action was brought to recover damages for the injury to the plaintiff and his property.

Two grounds of negligence are alleged in the complaint; first, the unsafe and defective condition of the track where the injury occurred; and, second, negligence in the operation of the locomotive that caused the injury. The cause was tried before a jury, resulting in a general verdict for the defendants, accompanied by the following special finding:

“Q. Did the defendant, the Great Northern Railway Company, own or control, or was it under any contract or agreement to construct, maintain or repair the track on which the accident which is the subject of this action occurred?
A. No.”

Judgment was entered on the verdict in favor of the defendants, and the plaintiff appeals.

The verdict of the jury eliminates the second ground of negligence charged, viz., negligence in the operation of the locomotive which caused the injury, and no error is assigned on that branch of the case. At the request of respondents, the court instructed the jury as follows:

“One of the grounds of negligence alleged in the complaint is that the track on which the accident occurred was so constructed as to be in a dangerous condition, and not admit of the ready and free passage of vehicles across the same. Upon this question I charge you that, if you shall find from the evidence in this case that the track in question was not the property of the defendant company, and that it had no control over the same, and was under no agreement to construct, maintain or repair it, and was allowed to use it only as a mere

matter of convenience for the transfer of cars from tracks of its own system to those of another system, then the defendant company would be under no duty or obligation to the public to see that said tracks were properly constructed or kept in proper repair or properly maintained. The defendant company would be under no obligation to the public or otherwise to repair tracks belonging to another company, and of which it had no control, and concerning which it had made no agreement in reference to construction, maintenance or repair, and if you shall find from the evidence in this case that the track in question was not owned by, or in some way controlled by, defendant company, and that it was under no agreement to construct, maintain or repair it, and that the defendants properly and with due care operated the train which came in collision with the plaintiff's vehicle, then your verdict must be for the defendants."

The principal question discussed on this appeal arises out of the giving of the above instruction, and the refusal of the court to give other instructions, the substance of which is contained in the following:

"If you find from the evidence that at the time of the injury the defendant Great Northern Railway Company was operating its trains on the tracks where the plaintiff was injured on Railroad avenue, then and in that case it would be the duty of the defendant Great Northern Railway Company to use reasonable effort to keep said track in repair and in reasonably safe condition for public travel thereon."

In cases such as this the liability of a railway company depends upon its control over the agency causing the injury, or the duty it owes to the injured party. It owes one duty to a passenger, another to an employee, and still another to a stranger. Counsel for appellant cites and relies on the case of *Herrman v. Great Northern R. Co.*, 27 Wash. 472, 68 Pac. 82, 57 L. R. A. 390. In that case the plaintiff was injured on a sidewalk on the line of the defendant's road, in front of the depot where its trains arrived and departed, and where tickets were sold to intending passengers. The plaintiff went to this depot on business with the company, and with a view

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of becoming a passenger on one of its trains. Under these facts this court held that it was the duty of the defendant company to keep the premises to which it invited its passengers to come to purchase tickets and take passage on its trains, as well as the approaches thereto, in a safe condition, and that it could not escape liability for an injury to one of its passengers, or to one occupying a similar position, by showing that the depot and the approaches thereto where the injury occurred were owned and controlled by an independent corporation. We fail to see the application of the case cited to the case at bar.

A railway company owes certain positive duties to its passengers which it cannot neglect or intrust to others. But the duty it owes to its passengers and the duty it owes to strangers are entirely different. To a passenger, it owes the duty to maintain a safe means of ingress and egress to and from its trains, whether it owns or controls the means or not. To a stranger, it owes the same duty as any other property owner. Had the plaintiff in the case cited been a mere stranger to the defendant company, he could not have recovered. In other words, the railway company in that case neglected a duty it owed to one of its passengers, but neglected no duty it owed to a stranger, unless it had dominion and control over the agency causing the injury.

The rule that the duty to keep premises in a safe condition devolves upon the party in possession and having control and dominion over them, is a very general one and is founded in reason. To hold a party liable in damages for the condition of property over which he has no control, and which he cannot repair without committing a trespass, is both unreasonable and unjust. As said by the court of appeals of New York, in *Reynolds v. Van Beuren*, 155 N. Y. 120, 49 N. E. 763, 42 L. R. A. 129:

“The foundation of the duty is the possession and right to manage and control the property. It would be manifestly

unjust to impose such a duty upon parties who have no possession and no dominion over it."

The question of the liability of lessors and lessees of railways is not involved in this case, as that relation manifestly did not exist between the Northern Pacific Railway Company and the Great Northern Railway Company, under the facts appearing in this record. We might say in passing, however, that while the law imposes liabilities on the lessors of railroad property which it does not, as a general rule, impose on the lessors of other property, yet the liability of the lessee of railroad property seems to be substantially the same, and to rest on the same foundation, as does the liability of the lessee of any other class of property. The case of *Trask v. Old Colony R. Co.*, 156 Mass. 298, 31 N. E. 6, arose under a statute, but the language of the court is pertinent here:

"The occasional use by each company of the track of the other, in delivering and taking cars in the course of business, would not, to that extent, make the track of each a part of the ways, works, or machinery of the other. It was permitted for their mutual accommodation, and was merely a license which did not give either any rights in or control over, and which did not impose upon either any obligation respecting the track of the other. The character of the business transacted is to be considered, and it would be unreasonable to hold that each company was bound to leave and take cars at the precise point of connection, at peril, if it did not do so, of making the track of the other part of its ways, works, and machinery, and of becoming liable for injuries resulting from any defect in it."

That the duty to keep premises in a safe condition of repair rests upon the party in possession, having control and dominion over them, and not upon parties who have neither control nor dominion nor the right to repair, see the following cases: *Gwathney v. Little Miami R. Co.*, 12 Ohio St. 92; *Engel v. New York etc. R. Co.*, 160 Mass. 260, 35 N. E. 547, 22 L. R. A. 283; *Coffee v. New York etc. R. Co.*, 155 Mass.

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21, 28 N. E. 1128; *Regan v. Donovan*, 159 Mass. 1, 33 N. E. 702; *Liddle v. Keokuk etc. R. Co.*, 23 Iowa 378; *Parker v. Rensselaer etc. R. Co.*, 16 Barb. 315; *Byrne v. Kansas City etc. R. Co.*, 61 Fed. 605, 24 L. R. A. 693; *Miller v. Minnesota etc. R. Co.*, 76 Iowa 655, 39 N. W. 188, 14 Am. St. 258; *Harper v. Newport etc. R. Co.*, 90 Ky. 359, 14 S. W. 346; *Atwood v. Chicago etc. R. Co.*, 72 Fed. 447; *Lake Erie etc. R. Co. v. Gaughan*, 26 Ind. App. 1, 58 N. E. 1072; *Derrenbacher v. Lehigh Val. R. Co.*, 87 N. Y. 636; *East Line etc. R. Co. v. Culberson*, 68 Tex. 664; *Miller v. New York etc. R. Co.*, 125 N. Y. 118, 26 N. E. 35; *Evans v. Sabine etc. R. Co.* (Tex.), 18 S. W. 493.

Appellant also cites us to the act of March 6, 1899, Laws 1899, p. 49. The first section of said act requires every person or company owning or operating a railroad to block and securely guard frogs, switches, and guard-rails, so as to protect and prevent the feet of employees and other persons from being caught therein. The second section gives a right of action to parties injured from a failure to comply with the provisions of the act; and the third section imposes a penalty for its violation. The statement of this case, as contained in this opinion, is taken largely from the pleadings and briefs. The bill of exceptions does not contain all the testimony. In fact it contains none of the testimony showing the nature or character of the defect which is alleged to have caused or contributed to the injury. The application of this statute to the case before us is, therefore, not shown, and we must decline to consider it.

Nor is there any foundation for the contention that the pleadings admit that the respondent company operated trains on the track where the injury occurred. The third paragraph of the complaint alleged in general terms that the respondents were operating trains on Railroad avenue, near the east side thereof, and other facts not material here. The answer denied each and every allegation contained in said paragraph

except that the respondents were operating trains on Railroad avenue. We fail to discover any admission here.

Finding no error in the record, the judgment of the court below is affirmed.

MOUNT, C. J., CROW, DUNBAR, FULLERTON, HADLEY, and ROOT, JJ., concur.

[No. 5545. Decided December 11, 1905.]

EDGAR AMES, *Respondent*, v. GEORGE KINNEAR *et al.*,
*Appellants.*¹

APPEAL—DISMISSAL—RECORD SHOWING INSUFFICIENT BOND—SUPPLEMENTAL TRANSCRIPT. Upon a petition for a rehearing, after the dismissal of an appeal for insufficiency of the bond, the supreme court will, in order to support its jurisdiction, allow a supplemental transcript to be filed showing an error by the clerk of the superior court in entering the order fixing the amount of the supersedeas bond on appeal, from which it appears that the bond was sufficient; and on such showing the appeal will be reinstated.

Motion to dismiss an appeal from a judgment of the superior court for King county, Irwin, J., entered November 16, 1904. Denied.

James M. Epler and *Charles A. Kinnear*, for appellants.
Sachs & Hale, for respondent.

OPINION ON REHEARING.

CROW, J.—This action was commenced to obtain a partition of certain tide lands, in King county. On November 16, 1904, a decree was entered in favor of respondent, at which time appellants in open court gave notice of appeal, and asked the trial judge to fix the amount of a supersedeas bond, which being done, the clerk made the following entry, in court journal 203, at page 571:

¹Reported in 82 Pac. 994.

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Opinion Per CROW, J.

"Counsel for defendants, in open court, gives notice of appeal to the supreme court from the final judgment and decree and from all orders adverse to the defendants. Court fixes supersedeas bond at \$500."

On November 17, 1904, appellants filed a bond in the sum of \$500, conditioned both as an appeal and supersedeas bond, and later ordered a transcript, which was filed in this court, and contained the above journal entry. On March 8, 1905, respondent moved to dismiss the appeal for insufficiency of such bond as both an appeal and supersedeas bond. This motion was heard by this court on March 31, 1905, and the appeal was dismissed. On April 1, 1905, appellants' attorney made an affidavit showing that the clerk of the superior court had made a mistake by failing to have said journal recite that the trial court had fixed \$500 as the amount of an appeal, and also a supersedeas, bond; that said attorney had no knowledge of such mistake until the motion was heard in this court, the transcript on appeal having been prepared and sent up without his having any opportunity to examine it; and that he had filed a motion in the superior court to have said journal entry corrected to state the facts. Said affidavit was promptly served and filed in this court on Monday, April 3, 1905, at which time appellants also filed their motion asking time to have said journal entry corrected and certified to this court.

On April 14, 1905, Hon. Mason Irwin, the trial judge, made and entered the following order in the superior court of King county:

"The court upon inspection of the entries in the appearance docket No. 72-P. 641 in this action, of date of November 16, 1904, and of the journal entry Vol. 203, page 517, in said action of said date, finds, that the clerk has made an erroneous entry in both the said appearance docket and the journal in inserting the word supersedeas in the entry in the appearance docket and which reads 'Court fixes supersedeas bond at \$500,' when the fact was that the entry should read 'Court fixes appeal and supersedeas bond at \$500;' and

upon inspection of said journal at page 571, Vol. 203, instead of the words the court fixes supersedeas bond at \$500, the fact was and the entry should read, court fixes appeal and supersedeas bond at \$500.

"It is therefore ordered that the entry in said appearance docket No. 72 page 641 of date Nov. 16, 1904, in this action, be and the same is hereby corrected by inserting before the word 'supersedeas' the words 'appeal and' so that the said entry read 'Court fixes appeal and supersedeas bond at \$500;' and,

"It is further ordered that the entry in said journal Vol. 203, page 571 and of date Nov. 16, 1904, in said action, be and the same is hereby corrected by inserting before the word 'supersedeas' the words 'appeal and' so that said entry read 'Court fixes appeal and supersedeas bond at \$500,' and that said entries be made as of date of the 16th day of November, 1904."

On April 28, 1905, appellants filed in this court a supplemental transcript containing a copy of said order, and at the same time filed their petition for a rehearing upon said motion. An answer to the petition having been ordered and filed, and appellants having replied thereto, a rehearing was granted and the motion has been again presented by counsel for respondent and resisted by counsel for appellants.

The record now before us states the facts as they actually occurred, showing that the bond fixed by the trial judge in the sum of \$500 was actually intended and ordered to operate both as an appeal and a supersedeas bond. This being true, the bond filed by appellants was sufficient, and this court obtained jurisdiction.

Respondent now contends that appellants should not be permitted to bring up any amendments of the record, after their appeal has been actually dismissed, but that, if they desired to secure the benefit of any such amendment, they should have acted prior to the formal order of dismissal. In support of this contention, respondent cites *Clark-Harris Co. v. Douthitt*, 5 Wash. 96, 31 Pac. 422, and *Boyer v. Boyer*,

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4 Wash. 80, 29 Pac. 981. We do not think these cases are applicable to the present facts, nor do they sustain respondent's position. Courts are organized for the purpose of administering justice, and appellate tribunals, by virtue of their inherent power, may, in furtherance of justice and in the exercise of a reasonable discretion, reinstate an appeal after its dismissal. In *Powell v. Nolan*, 27 Wash. 318, 346, 67 Pac. 712, 68 Pac. 389, this court on petition for rehearing said:

"The respondent Powell, sends up with his petition a correct transcript of the return of service of summons on James Nolan, from which it appears that James Nolan was duly served, so as to confer upon the court jurisdiction over him. The failure to show the service of the summons in the original action was through a mistake of the clerk in transcribing the return of such service; and as this was not called to the attention of the respondent in the brief of the appellants, or otherwise, save in the opinion herein, the judgment of the respondent Powell should be, and the same is, affirmed."

In *Watson v. Sawyer*, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43, this court on petition for rehearing said:

"It is an almost universal practice with appellate courts to exercise their discretion to the fullest extent by way of allowing supplemental transcripts to be filed in furtherance of an appeal or to support their jurisdiction in a case in which action has been taken, but it is an equally universal practice not to allow this to be done for the purpose of disclosing a want of jurisdiction."

In the case last cited, we disregarded a supplemental transcript for the reason that its tendency was to disclose a want of jurisdiction in this court on appeal; but in the case at bar, the effect of the supplemental transcript filed by appellants with their petition for a rehearing is to show jurisdiction. In the exercise of a reasonable discretion and in furtherance of justice, it should now be considered.

The order heretofore entered dismissing the appeal is vacated, and the motion to dismiss is denied.

MOUNT, C. J., DUNBAR, FULLERTON, HADLEY, RUDKIN, and ROOT, JJ., concur.

[No. 5790. Decided December 11, 1905.]

ARVILLA WALSH, *Respondent*, v. AUGUST MEYER *et al.*,
Appellants.¹

PLEADING — OBJECTIONS — FAILURE TO DEMUR — CONSTRUCTION. A complaint for fraud and false representations, although exceedingly meager, will be liberally construed and upheld if possible, when attacked for the first time at the trial.

SALES—FRAUD—RESCISSION BY VENDEE—DUTY TO INVESTIGATE—INSTRUCTIONS. In an action for damages by reason of fraud in the sale of a rooming house and fixtures, and false representations as to the reputation of the house and its tenants and the profits of the business, instructions are erroneous where they do not cast upon the plaintiff the burden of such investigation as the opportunity furnished.

SALES—WARRANTY—MEASURE OF DAMAGES. The measure of damages for breach of warranty as to the character of a rooming house sold to the plaintiff, is the difference between the value of the property and what it would have been if as represented to be.

SAME—DAMAGES—FRAUD—MENTAL AGONY. In an action for damages for false representations as to the reputation of a rooming house sold to the mother of two young girls, damages for humiliation and mental agony due to the ill repute of the house and its inmates cannot be recovered.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 18, 1905, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits in an action of deceit. Reversed.

Winsor & Hadley, for appellants.

W. L. Waters, for respondent.

¹Reported in 82 Pac. 938.

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Opinion Per DUNBAR, J.

DUNBAR, J.—A summary of the allegations of the complaint in this action is to the effect, that on or about the 25th day of January, 1904, the plaintiff applied to defendants to purchase a rooming house, and the furniture in the house, located on Second avenue, Seattle; that plaintiff represented to defendants that she was unacquainted with the rooming business, and that she relied upon their statements in regard to the business; that thereupon the defendants, with intent to defraud and deceive, represented that all the rooms in said house were occupied and that the persons occupying them were permanent roomers, and that there was a net profit in the business averaging \$45 a month; that the house had a good reputation, and that the roomers were of good character and reputation; that thereupon the plaintiff paid to the defendants the sum of \$750 cash for the aforesaid rooming house, business, furniture, and good will, and thereafter moved in and took possession of said house and furniture; that the aforesaid representations made by the defendants were false, and known by the defendants to be false when they were made, and were made with intent that plaintiff rely upon the same, and were false in that the rooming business was not bringing in a net profit of \$45, but was running at a loss of \$40 a month; that the roomers who were occupying said rooms were not of good reputation, in that two women who occupied the front lower room of said house were women of ill repute, and known by the defendants to be such, and that they conducted themselves in such a way that it greatly humiliated, frightened, and grieved the plaintiff, and that she was forced to eject them and their men visitors from the premises; that by reason of said misrepresentations made by defendants, upon which plaintiff relied, she has suffered damage, in that the said rooming business was not earning a profit; that the reputation of said house rendered it difficult to get and keep respectable roomers; that the furniture was of less value when moved, and that plaintiff was greatly shocked, frightened, humiliated, and outraged, both on ac-

count of herself and of being the mother of two young girls, and suffered great mental agony and grief on account of the position in which she found herself placed, which said damage amounted in all to the sum of \$2,000.

The defendants answered, denying any misrepresentations whatever, denying that the house was running at a loss of \$40 a month, or any other sum; denied the representations that the house was averaging in excess of the expenses about \$45 a month; denied that the reputation of the roomers in the house was discussed at all at the time the plaintiff rented the house; denied any damage to the plaintiff by reason of any misrepresentations made by the defendants, or that the plaintiff was shocked or frightened or humiliated or outraged, either on account of herself, or on account of being the mother of young girls, or that she suffered any grief whatever through any act of the defendants; but asserts that the plaintiff applied to the defendant Adele Meyer to purchase said lodging house, made several examinations thereof, and expressly stated, when she entered into the agreement with Adele Meyer for the purchase of said lodging house, that she had thoroughly examined the premises herself and was satisfied with the same as she found them and was willing to purchase the same upon her own examination. The reply denied the affirmative matters set up in the answer.

It appears from the testimony, that the plaintiff, after twice visiting the house and examining it, made an offer for the same, which was finally accepted by the defendants; that \$150 was paid down on the house; that plaintiff returned to Walla Walla, and, after a week or ten days, came back to Seattle, bringing her children; again went to the house and, after an examination of the same, paid the balance of the money and took a bill of sale of the house. The case was tried to a jury, and a verdict rendered in favor of the plaintiff in the sum of \$1,350. Judgment followed, from which this appeal is taken.

After the issues were formed, the appellants objected to

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any testimony being offered under the allegations of the complaint, stating that it did not constitute a cause of action. This objection was overruled, and the action of the court in that respect constitutes the second assignment of error on this appeal. It may be conceded that the complaint in this case is exceedingly meager, and we will not now decide upon its sufficiency if it had been challenged by demurrer. But this court will not scan a complaint too critically where there has been no demurrer interposed, but the case has been allowed to go to trial to the extent of settling the pleadings and creating the expense of a convocation of the witnesses, as we do not regard such a practice as commendable.

A great number of errors are assigned, many of which, in consideration of the conclusion we have reached, it will not be necessary to discuss. The appellants, however, excepted to the following instructions and urge their giving as reversible error here. The court, after stating to the jury the allegations of the complaint in detail, proceeded as follows:

"You are instructed that it is for you to judge whether upon all the evidence in this case, the representations, if any, made by the defendants were calculated by them to, and did, mislead the plaintiff. I instruct you that, if you find from a fair preponderance of the evidence that the defendants made representations to the plaintiff that the moral character of the occupants of the house which plaintiff purchased was good, or that the rooms were all rented, or that the house was making a profit over expenses, and that such representations, or any of them, were false and defendants knew them to be false, and they were calculated by defendants to mislead and deceive her, whereby plaintiff was induced to purchase said house and pay her money, I instruct you that you should find a verdict for money in favor of the plaintiff."

This instruction was wrong, in that it did not place the burthen of investigation upon the respondent. This court has uniformly held that, especially where there was no fiduciary relation existing between the parties to the contract, and they were both standing on equal ground, a duty was

imposed upon the purchaser to make an examination of the subject-matter of the contract; and that, when the opportunity was furnished to make such examination and the purchaser failed or neglected to do so, he could not rely upon representations made by the seller. This, in substance, has been the effect of a long and unbroken line of decisions. The court proceeding said:

"I further instruct you that, if in the light of the foregoing instructions, you find from the evidence that the plaintiff is entitled to recover on account of the false representations made by the defendants, if any, that she is entitled to all compensatory loss and damage which you find that she suffered and sustained as a direct consequence and result of relying upon the false representations of the defendant, if any."

This instruction, in view of the fact that the respondent had alleged damages by reason of humiliation and outraged feelings, both on account of herself and of being the mother of two girls, and had also alleged damages for great mental agony and grief on account of the position in which she found herself placed, tended to submit to the jury a class of damages which could not be collected in this kind of a case. The only limitation that the court placed upon the amount of damages, to the jury, was in the following:

"If you should find from a preponderance of the testimony in this case for the plaintiff, you will find for her in such sum as you think will compensate her for the damages she has alleged she has sustained, but in no event can you find for her a greater sum than was asked for in her complaint."

Thus it will be seen that the jury, under the instruction of the court, might very well have concluded that they had a right to compensate her for the damages in relation to outraged feelings, etc., because they were damages which she alleged she had sustained. The court did not, in any place or at all, instruct the jury as to the proper measure of

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damages in a case of this kind, or as to any measure of damages. It is hardly worth while to discuss the proposition that a portion of the damages alleged here, for humiliation and mental agony, are not such damages as can be obtained under a complaint of this character for misrepresentation in the sale of a house. The measure of damages for breach of warranty as to the character or quality of the property sold is, as a general rule, the difference between the actual value of the property and what its value would have been had it conformed to the warranty. Not only was there no instruction to the jury as to the measure of damages, but neither was there any proof upon which a jury could base an intelligent verdict. The verdict of the jury in this case for \$1,350 could in no event be sustained, for the value of the property could not be presumed to have been more than the respondent paid for it, and she sold it, after running the business for eight months, for \$400.

The verdict, as it will be seen, must have been arrived at through a misapprehension of what the true measure of damages in such a case was. Indeed, the whole case seems to have been a mistrial. There was really no testimony offered as to the damages alleged under the complaint, any more than the broad statement made by the respondent that she was damaged \$1,350, which included the \$750 which she paid for the house. Everything seemed to have been lost sight of in the attempt to show that two girls who roomed in the house were not of reputable character. They, however, left the house within a day or two after the incoming of the respondent, and there was no testimony showing that the alleged failure of the respondent to make the business pay was due to the presence of these girls at the time she bought the house. While the energies of the appellants seem to have been expended in attempting to show the reputation of the respondent through a period reaching back many years, for the evident purpose of showing that she was not the character of a woman that could be the

recipient of mental agony by reason of the embarrassing condition which she stated she found herself in when she took charge of the house; a question which, as we have indicated, was entirely outside of the issues of the cause.

For these reasons, the judgment must be reversed, and upon a retrial the testimony will be restricted to the questions at issue, and to the damages under the rule which we have announced. Reversed.

MOUNT, C. J., HADLEY, FULLERTON, RUDKIN, CROW, and ROOT, JJ., concur.

[No. 5842. Decided December 11, 1905.]

LEWIS R. DAWSON, *Respondent*, v. MAMIE C. DAWSON,
Appellant.¹

APPEAL—RECORD—EVIDENCE NOT BROUGHT UP. Upon appeal from an order denying an application as to the custody of children, the supreme court cannot review the decision where both sides consented that the trial court interview the children privately and use the information thus acquired, and the testimony so taken is not brought up in the record.

APPEAL—REVIEW—ESTOPPEL—CONSENT TO PROCEEDINGS. The appellant cannot allege error in the court's availing itself of a private examination of witnesses, after having consented to such proceeding.

Appeal from an order of the superior court for King county, Morris, J., entered March 23, 1905, after a hearing before the court on the merits, denying a petition to modify a decree of divorce. Affirmed.

McCafferty & Bell, for appellant.

Harold Preston, for respondent.

PER CURIAM.—On July 10, 1896, the respondent obtained a divorce from the appellant, for cause distinctly stated in

¹Reported in 82 Pac. 937.

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the complaint and found proven by the court granting the decree. The issue of the marriage between the appellant and respondent was two boys, then of the ages of five and six years, respectively. The decree (as subsequently modified) awarded the custody of these boys to the appellant until the youngest should reach the age of eight years, when it directed that they be given into the custody of the respondent. On their arriving at the age named in the decree, the respondent took them into his custody and has since cared for and maintained them. In this proceeding the appellant seeks to have the decree modified, so as to award to her their custody; alleging in her petition therefor that the boys are not being properly cared for, are unhappy in their present surroundings, and that she is abundantly able to control and maintain them. Issue was taken on the allegations of the petition and a hearing had, resulting in a refusal on the part of the court to modify the decree.

The appellant's counsel contend earnestly that the conclusion reached by the court is erroneous, and that it is made to appear clearly by the record that the welfare of the children requires a change from their present surroundings. But while we might think these questions doubtful, even upon the record as presented to this court, we are met at the threshold of our examination with the fact that the evidence that was before the trial court, and upon which it based its conclusion, is not all in the record. In support of the petition and the denial thereof, affidavits and counter-affidavits were filed. These are in the record. But it appears that both parties agreed that the trial judge might examine the boys privately, apart from the parties and their counsel, and use the information that he might thus acquire in arriving at his conclusions. It appears that the judge availed himself of this consent; that he did examine the boys privately; and a perusal of his opinion shows that his conclusion was

made up largely from the facts elicited from this examination. Without the evidence of these witnesses before us, we cannot determine whether the conclusion of the court upon the merits was right or wrong.

Apparently appreciating the situation, the appellant, in her brief, assigns as error the manner in which these witnesses were examined, but plainly the appellant cannot successfully complain in this court of that to which she consented in the court below.

The order appealed from is affirmed.

[No. 5728. Decided December 11, 1905.]

FRANKLIN FIREBAUGH, *an Infant*, by *W. R. Kelly, His Guardian Ad Litem, Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.¹

CARRIERS—NEGLIGENCE—INJURY TO PASSENGER ON STREET CAR—BLOW-OUT OR EXPLOSION—PRESUMPTION—DOCTRINE OF *RES IPSA LOQUITUR*. Where an accident to a passenger on a street car is due to an explosion or blow-out of the controller, a presumption of negligence on the part of the carrier arises, since the doctrine of *res ipsa loquitur* applies where the accident is due to equipment or operation over which the carrier had entire control.

SAME—ACT OF PASSENGER IN IMMINENT PERIL—JUMPING FROM CAR—APPLICATION OF DOCTRINE. The fact that the plaintiff, in imminent peril, without negligence on his part, undertook to escape from a burning or exploding controller by jumping from a street car, and was injured by the fall, does not affect the presumption that the accident was due to the negligence of the carrier.

SAME—CAUSE OF ACCIDENT UNKNOWN—PRESUMPTION. Proof on the part of the defendant, a street railway company, to the effect that the witnesses did not know what caused the controller to blow out or explode, which sometimes happened without any known cause, will not, as a matter of law, rebut the presumption of negligence arising therefrom in favor of a passenger; especially where there was testimony showing different possible causes that might have been controlled and remedied; and the question is one for the jury.

¹Reported in 82 Pac. 995.

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Citations of Counsel.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 16, 1905, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in jumping from a street car to avoid danger from an exploding controller. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant, contended, *inter alia*, that negligence will not be presumed from the mere fact of an accident which is as consistent with the presumption that it was unavoidable as it is with negligence. 4 Elliott, Railroads, § 1644; *Pennsylvania R. Co. v. McKinney*, 124 Pa. St. 462, 17 Atl. 14, 10 Am. St. 601, 2 L. R. A. 820; *Breen v. New York etc. R. Co.*, 109 N. Y. 297, 4 Am. St. 450; *Saunders v. Chicago etc. R. Co.*, 6 S. D. 40, 60 N. W. 148; *Stern v. Michigan etc. R. Co.*, 76 Mich. 591, 43 N. W. 587. Having raised certain issues, the plaintiff could not rely upon a general presumption of negligence. *West Chicago etc. R. Co. v. Martin*, 154 Ill. 523, 39 N. E. 140; *Chicago etc. R. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921. The doctrine of *res ipsa loquitur* does not apply where the passenger's voluntary action contributes to the result. Thompson, Carriers, p. 214; 2 Wood, Railways, p. 1099, and cases cited; *Dresslar v. Citizens' St. R. Co.*, 19 Ind. App. 383, 47 N. E. 651; *Pittsburg etc. R. Co. v. Aldridge*, 27 Ind. App. 498, 61 N. E. 741; 5 Am. & Eng. Ency. Law (2d ed.), 628. The presumption of negligence cannot prevail against the positive evidence in this case. *Georgia R. etc. Co. v. Wall*, 80 Ga. 202, 7 S. E. 639; *Florida etc. R. Co. v. Rudolph*, 113 Ga. 143, 38 S. E. 328; *Murray v. Pawtuxet Val. etc. R. Co.* (R. I.), 55 Atl. 491; *Robinson v. New York etc. R. Co.*, 9 Fed. 877; *Pierce v. Great Falls etc. R. Co.*, 22 Mont. 445, 56 Pac. 867; *Cheetham v. Union R. Co.* (R. I.), 58 Atl. 881; *Bernhardt v. West Pennsylvania R. Co.*, 159 Pa. St. 360, 28 Atl. 140.

Brady & Gay, for respondent.

DUNBAR, J.—The action was brought by the respondent to recover damages for personal injuries, sustained by jumping from a front platform of a street car operated by the appellant company, and on which he was a passenger. The complaint alleges, among other things, that the defendant carelessly and negligently used the said car when it was out of repair, in its motor power and in its appliances appertaining thereto; that while the plaintiff was such passenger on said car, by reason of defendant's negligence, the controller, machinery, and appliances of said car exploded, and filled the vestibule thereof with smoke and flames, to such an extent that all the front portions of said car became greatly heated; that, by reason thereof, the plaintiff was placed in a situation of apparent and imminent peril, and was dominated by the peril of impending danger, and believed that the only way he could save himself was to jump from said car; and without time to deliberate, and acting on the instinct of self-preservation, did jump and was thrown against hard substances beside the track, and thereby injured.

The defendant, in its answer, admitted that the plaintiff was a passenger, and that he did jump from the car at the time and place alleged, but denied every allegation of negligence on its part, and pleaded affirmatively contributory negligence on the part of the plaintiff in carelessly and negligently jumping, or climbing over the gate on the platform of its car while the same was closed. The reply denied contributory negligence. The case was tried to a jury, which resulted in a verdict for the plaintiff. Judgment followed, and this appeal is taken therefrom.

There are but two assignments of error, the first that the court erred in giving instruction No. 5, which was as follows:

“When a controller upon a car of a street railway company blows out or burns out, the law presumes that such blowing or burning resulted from some defect of the controller or other appliances of the car, or means used by the

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company in the operation of the car, and in such a case it devolves upon the company to show that such burning or blowing out did not result from any cause which the highest degree of care on its part could have prevented."

Assignment 2 is that the court erred in denying defendant's challenge to the legal sufficiency of the evidence, and in refusing to instruct the jury to return a verdict for the defendant. The allegation of contributory negligence raised in the answer is not urged here.

It is contended by the learned counsel for appellant that the doctrine of *res ipsa loquitur* does not apply in a case of this kind, and that it was improper in this case to tell the jury that they were entitled to find the appellant negligent upon proof of the accident alone; and the case of *Allen v. Northern Pac. R. Co.*, 35 Wash. 221, 77 Pac. 204, is cited in support of the contention that the doctrine of *res ipsa loquitur* has been somewhat modified by this court. It is insisted by the appellant that it is manifest that this court has not intended to announce the rule that there is a presumption of negligence unless it is apparent that the accident could not have happened without negligence on the part of the carrier. This is no doubt true, for the rule of *res ipsa loquitur* is based upon the apparent fact that the accident could not have happened without negligence on the part of the carrier; or, upon the literal meaning of the expression, that the thing itself speaks, and shows *prima facie* that the carrier was negligent.

The cases which we will hereafter cite do not in any way contradict the further contention of the appellant that a careful analysis of the better considered decisions shows that negligence will not be presumed from the mere fact of accident which is as consistent with the presumption that it was unavoidable as it is with negligence; and, therefore, if it be left in doubt what the cause of the accident was, or if it may as well be attributable to the act of God or unknown causes

as to negligence, there is no such presumption. As we have said, this does not affect the principle of law that, when, by reason of the machinery and appliances used by the common carrier, wholly under its control, a passenger is injured, this fact shows *prima facie* negligence on the part of the carrier. Looking to eminent authority for expression on this subject, we find the following announcement in *Nellis on Street Railroad Accident Law*, pp. 590, 591.

“Where the plaintiff is a passenger on a street car, a *prima facie* case of negligence is made out by showing the happening of the accident during the course of transportation; and if the injury was caused by apparatus wholly under its control, furnished and applied by it, a presumption of negligence on the part of the company is raised, and the burden is on the latter to prove itself not guilty of negligence.”

The same rule is substantially laid down by *Shearman & Redfield* on the Law of Negligence, and by all other authority.

In *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458, which was an action for damages caused by a land slide in a railway cut, the doctrine of *res ipsa loquitur* was applied, and the court announced the rule as follows:

“Since the decisions in *Stokes v. Salstonstall*, 13 Pet. 181, and *Railroad Company v. Pollard*, 22 Wall. 341, it has been settled law in this court that the happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance; and was followed at the present term in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551.”

In answer to the contention of the carrier in that case, to the effect that the operation of the rule was confined to cases where the accident resulted from defective arrangement, man-

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agement, or miscontruction of things over which the defendant had immediate control, etc., the court said:

“Neither of these attempted distinctions is sound, since, as has been shown, the defect was in the construction of that over which the defendant did have control and for which it was responsible, and since the slide was not caused by the act of God, in any admissible sense of that phrase. Moreover, if these distinctions were sound, still, as a matter of correct practice, the modification should have been made. The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant’s responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his *prima facie* case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of the exculpation, whether disclosed by the one party or the other. They are its matter of defense.”

So that it will be seen that the court in that case went further than it is necessary to go here, because the fact is undisputed in this case that the accident was caused by appliances over which the appellant had absolute control.

This broad announcement, however, has been somewhat modified by this court in *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. 72, 16 L. R. A. 808, where it was held that the statement that, where a passenger was being carried on a train and was injured without fault of his own, there was legal presumption of negligence, casting upon the carrier the burden of disproving it, was too broad. But that was upon the express ground that the nature of the accident was not such as to warrant saying anything about the machinery, the case being an accident caused to the passenger while occupying a seat upon the dummy car of a cable railway, by reason of a collision between the dummy and a wagon which was on the track. But the rule announced in *Federal Street etc. R. Co. v. Gibson*,

96 Pa. St. 83, was indorsed in that case as being the proper rule, and there it was said:

“It is true, in many cases, the mere fact of injury to a passenger raises the presumption of want of care on the part of the railroad company. Such is the case when the injury results from defective track, cars, machinery or motive power.”

The whole case conclusively shows that there was no attempt to disturb the well-settled rule that, where the accident was caused by machinery or equipment over which the carrier had absolute control, the presumption of negligence on the part of the carrier would attach. And no further modification was intended by this court in *Allen v. Northern Pac. R. Co.*, *supra*. The court there quoted approvingly from Elliott on Railroads, Vol. 4, § 1644, which is as follows:

“It is, therefore, too broad a statement of the rule to say that, in all cases, a presumption of negligence on the part of the carrier arises from the mere happening of the accident or an injury to a passenger regardless of the circumstances and nature of the accident. The true rule would seem to be that when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road, over which the company had entire control, without contributory negligence on the part of the passenger, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury.”

It would seem that this case falls squarely within the announcement there made. The accident was unquestionably caused by something in connection with the equipment or operation of the road over which the company had entire control, and it is not contended that there was contributory negligence on the part of the passenger. It follows then, from

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the announcement of Mr. Elliott quoted, and which is also cited by the appellant in this case, that the presumption of negligence on the part of the company arises from such facts, and this is all that is stated by the instruction complained of. The modification in all the cases mentioned is simply to the extent that it is not sufficient to make the bare allegation that the plaintiff was a passenger on the defendant's cars and that an accident occurred by reason of which he was injured, or to rely upon such proof, or to give such an instruction, because manifestly many accidents might occur to a passenger on a train the cause of which could not to any extent be attributed to the negligence of the carrier.

This question has again lately been before this court, and the authorities generally reviewed, in the case of *Williams v. Spokane Falls etc. R. Co.*; 39 Wash. 77, 80 Pac. 1100, where it was held that evidence that the injury of a passenger was connected with the operation of a railroad makes it a *prima facie* case of negligence, devolving on the carrier the duty of overcoming the presumption. And the distinction was shown there between instructions which were absolutely unlimited in their scope, and which might lead the jury to believe that even the proof of an accident caused by some agency which was not connected with the operation of the road would make a *prima facie* case of negligence on the part of the carrier, and an instruction which applied to accidents occurring by reason of something connected entirely with the operation of the road; citing Thompson's Commentaries on the Law of Negligence, Vol. 3, § 2754, where these distinctions are plainly set forth. It is true that this case is now pending in this court on a petition for rehearing, but the petition does not raise any of the questions involved in the case at bar. We think that, if the doctrine of *res ipsa loquitur* could be applied in any case of accident between a passenger and a common carrier, it would naturally apply in this case.

The appellant, however, insists that, even if under the gen-

eral rule it should apply, it cannot apply under the circumstances of this case, because the respondent was not relying upon the operation of the car by the appellant, and was therefore not a passive recipient; and the presumption of negligence could not obtain because he acted himself and to a certain extent took the matter into his own hands by jumping from the car; and some cases are cited in support of this contention. We think, upon an examination of the cases, that they do not in any manner sustain appellant's contention, and that, when it is conceded, as it must be from an examination of the testimony in this case, that the plaintiff was warranted in retreating from the peril which threatened him, and when in fact he would have been guilty of contributory negligence if he had not attempted to save himself by retreating, there is no equitable rule which could deprive him, by reason of such cautionary action on his part, from pleading negligence on the part of the carrier.

It is further earnestly contended by the appellant that, in any event, it was shown by the appellant that there was no negligence on the part of the carrier, and that the court should have sustained the challenge as to the legal sufficiency of the evidence. An examination of this testimony satisfies us that it was not proven that the cause of the blow-out of the controller was beyond appellant's control. It was simply shown by the witnesses who testified that they did not know what the cause was, and that sometimes a blow-out would occur and the cause could not be ascertained. There is in science a cause for everything. But, outside of this, there was testimony offered by the respondent showing different causes for the explosion which might have been controlled and remedied by the appellant; and under the testimony, it was a question for the jury to determine whether the appellant rebutted the presumption of negligence which, under the law, attached to it by reason of the accident occurring. This question having been submitted to the jury under proper instruc-

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tions, we are unable to find any error in the record, and the judgment is affirmed.

MOUNT, C. J., RUDKIN, FULLERTON, HADLEY, CROW, and ROOT, JJ., concur.

[No. 5816. Decided December 11, 1905.]

D. G. RUSSELL, *Appellant*, v. JENNY GRAUMANN,
Respondent.¹

APPEAL—DISMISSAL—BOND—SUFFICIENCY—SUPERSEDEAS—FIXING BY COURT. In an action to recover for services, in which the defendant had judgment of dismissal and for \$17 costs, the amount of the appeal and supersedeas is determined thereby regardless of a writ of garnishment involving a larger sum; and a bond in the sum of \$240 is sufficient.

HUSBAND AND WIFE—FAMILY EXPENSES—LIABILITY OF WIFE. Under Bal. Code, § 4508, providing that the expenses of the family are chargeable upon the property of both husband and wife, the wife is liable for hospital charges and medical attendance upon the husband during his last illness, although residing in another state at the time, where there was no positive evidence that the family relation had been severed, but on the contrary it appeared that they were in intimate communication, and after the husband's death the estate was, on petition of the wife, set aside as exempt to her for the support of herself and children.

Appeal from a judgment of the superior court for Spokane count, Huneke, J., entered March 25, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action against a wife for medical and hospital services to the husband. Reversed.

James Dawson, for appellant.

Willis H. Merriam, for respondent.

HADLEY, J.—This is an action to recover for services rendered by the plaintiff as a physician, and also for hospital

¹Reported in 82 Pac. 998.

services, the latter claim having been assigned to the plaintiff. The services were rendered to one J. H. Graumann, during his last illness, at the Sacred Heart hospital, in the city of Spokane. The defendant was the wife of the deceased at the time of the latter's death. The complaint avers that the deceased and the defendant were husband and wife, and that, at all times mentioned in the complaint, they maintained the status and relationship of a family, mutually contributing to each other's aid and support as such family. It is also alleged that an administrator of the estate of the deceased was duly appointed by the superior court of Spokane county, and that the claims here involved were duly presented to said administrator, and were allowed by him and by said court; that there are no assets of said estate within the possession of said administrator, or within the state of Washington. The answer admits that, at all times mentioned in the complaint until the death of the deceased, he and the defendant were husband and wife; but denies that during those times they maintained the status and relationship of a family, mutually contributing to each other's aid and support as such family. The cause was tried by the court without a jury, and resulted in a judgment for the defendant and for costs against the plaintiff. The plaintiff has appealed.

Respondent moves to dismiss the appeal on the alleged ground that appellant has not furnished an appeal bond as required by law. It is insisted that the bond purports to be both a supersedeas and cost bond; that it is insufficient in amount for a supersedeas bond; and that the court fixed no amount for such bond. The judgment rendered against appellant was that he should take nothing by his action, and that respondent should recover \$17 costs. The only purpose the supersedeas bond can serve is to stay the issuance of execution for the \$17. The judgment is a final one for the recovery of a definite sum of money. It was therefore unnecessary for the court to fix an amount for a supersedeas bond. The bond given is in the sum of \$240. It there-

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fore includes the \$200 necessary for a cost bond and, in addition thereto, more than double the amount of the judgment. Respondent urges that a supplemental record which she has brought here shows that a writ of garnishment has issued in the action, which involves \$305.30 of her funds, and that the bond is, for that reason, insufficient in amount. The amount of the appeal and supersedeas bond is determined by the judgment in the cause, and is not dependent upon the existence of the garnishment or upon the amount of funds to which it is directed. The motion to dismiss the appeal is denied.

The appellant seeks to maintain this action against the wife under the authority of Bal. Code, § 4508, which reads as follows:

“The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.”

That ordinary medical aid and advice for the wife create family expenses has been repeatedly held. 15 Am. & Eng. Ency. Law (2d ed.), 877, and cases cited. The husband is a part of the ordinary family, and under a statute providing in general terms for liability for “expenses of the family,” as does our statute quoted above, we see no reason why medical and hospital services rendered to a husband are not as fully comprehended in the statute as are those rendered to a wife. We do not understand that respondent seriously contends that such is not the law, but she urges that the necessary family status or relationship intended by the statute did not exist between her and her husband so as to render her liable. The record discloses that the trial court adopted that view, and held that recovery cannot be had in this action for the reason that the husband and wife did not sustain the relation of a family within the meaning of the statute. We shall therefore confine our discussion to the relationship that

is shown to have existed between the respondent and her deceased husband.

Appellant urges that the pleadings do not raise the issue that the family relationship had been severed, and that the testimony upon that subject is not relevant to any issue in the case. It is true the answer does not in terms aver the severance of such relation, and appellant argues that the denial of the averments of the complaint on the subject of the family relationship is couched in such involved language that it is insufficient as a denial. However, in view of the result we have determined should be reached in the case, we shall, without discussion, pass over appellant's contention as to the pleadings, shall treat them as including the issue that the family relationship was severed, and shall consider all evidence offered upon that subject.

The evidence discloses that for about three years the deceased had been residing in Spokane, where he pursued his occupation as a painter. During at least a part of that time the respondent was not in Spokane, but it is not established by the evidence, as we view it, that she was not at any time in Spokane with her husband. During his last illness, and at the time of his death, she was in the state of Pennsylvania. But, assuming that respondent may not at any time have been with her husband in the city of Spokane, it does not follow from that fact alone that the family relationship had in a legal sense been severed. It is not necessary that the husband and wife shall at all times reside together under the same roof, in order that the legal status of the family may be preserved. It is a matter of common knowledge that many husbands in their struggles for a livelihood are often required to be far from home, and for long periods of time, and that such enforced absences are in behalf of the family, in order that the comforts of life may be provided for them. Such absence may be strong evidence of affection and regard for the family, rather than otherwise. It will not do to say that

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in such cases the family status is destroyed by somewhat continued absence of the husband.

There is nothing in this record to show that the deceased husband of respondent did not establish his residence in this state for the purpose of providing for his family, or that respondent and her children did not intend at some time to join him here. There is no positive evidence in the case that any intention ever existed on the part of either husband or wife to sever the family relationship. Any conclusion of that kind is a mere inference from the fact that the husband was in Washington and respondent was in Pennsylvania. So far as the evidence discloses, an affectionate relationship continued to exist until the death of the husband. The two corresponded frequently while he sojourned at the hospital during his last illness. Letters of tender solicitude for her husband were written by respondent to the Sisters at the hospital, and frequent anxious inquiry was made concerning him. Respondent remitted to the hospital, on different occasions, amounts aggregating \$72, to apply on the hospital expense, and promised to pay the remainder. Thus she at all times during his illness manifested the most sincere regard for his welfare and contributed to aid in his comfort. Moreover, after the death of the husband, the respondent petitioned the superior court of Spokane county to set aside to her the entire estate of her husband as being less than \$1,000 in value. Her petition must have been based upon the existence of the family relation. She procured a decree awarding the estate to her for the support of herself and children. The statute which authorizes such award, Bal. Code, § 6215, was intended as a provision for the family surviving the husband and father. Respondent cannot claim the estate of the husband in behalf of the surviving family, and at the same time repudiate his relationship to that family in legal contemplation. Under all the evidence, we think the court erred in holding that the family relation had been severed prior to the death of the husband.

In *Jennison v. Hapgood*, 10 Pick. 77, the husband was long absent from his family, and led a somewhat wandering life. The court said:

"The presumption is that he did not intend to abandon them, and this presumption is so strong, that it requires the most cogent proof to remove it."

In *Hudson v. King Brothers*, 23 Ill. App. 118, the liability of the wife for a family expense created by the husband was under consideration. It was contended that the wife was not liable for the reason, as she claimed, that she and her husband were living separate and apart. The husband was much away from his family. After reviewing the acts of the parties bearing upon this subject, the court said:

"If there had been an actual separation, neither of the parties would have done as the evidence shows they did. There is nothing in this point."

We think it may as well be said here that, if there had been an actual separation between respondent and her husband, they would not have done as they did.

Respondent relies much upon the authority of *Gilman v. Matthews* (Colo. App.), 77 Pac. 366. There it was sought to establish liability of a wife for the expense of clothing used by the husband alone. It was held, under the issues and facts shown in evidence, that the wife was not liable. The court, however, stated in the opinion that there was no evidence showing that the family relation existed between the parties. While it may appear from the reasoning of that court that its views may not be altogether in harmony with what we have hereinbefore said concerning the nature of facts which may be sufficient to establish the legal existence of the family relation, yet the case cited was determined in favor of the wife, on the theory that the family relation was not shown to exist. Such is not true in the case at bar, under our views of the evidence, as already stated. It follows that appellant is entitled to recover.

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Syllabus.

The judgment is reversed, and the cause remanded with instructions to enter judgment for appellant.

MOUNT, C. J., FULLERTON, RUDKIN, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 5753. Decided December 13, 1905.]

MARTHA I. LANDIS, *Appellant*, v. J. A. WINTERMUTE,
Respondent.¹

ATTORNEY AND CLIENT — TRANSACTIONS BETWEEN — GOOD FAITH. Where a sale of mining stock from an attorney to an inexperienced woman grew out of transactions in which he represented her as an attorney and in a confidential relation, whereby he gained her confidence, he is bound to use the utmost good faith, the burden of proving which will be upon him; and the sale should be rescinded if material matters were misrepresented.

SALES — RESCISSION — FRAUD — TRANSACTIONS BETWEEN ATTORNEY AND CLIENT. A sale of mining stock by an attorney to his client, an old lady inexperienced in business matters, for whom he had been transacting business, should be cancelled for fraud, where the client testified that he represented it as a sale by the company, in which he had no interest, and that a monthly dividend equal to ten per cent per annum would be paid thereon, while the fact was that he sold her his own stock at one dollar per share, when its highest selling price was fifty cents per share, and advanced the monthly dividend himself, the company never having paid any dividends, and where her testimony is strongly corroborated by a letter written by the attorney describing the transaction as testified to by her.

SAME — LACHES — WAIVER OF RESCISSION. In such a case the client is not estopped by neglecting to rescind the sale upon being informed that the stock sold for fifty cents a share, when she thereupon asked the attorney to show her his stock, and her suspicions were allayed by seeing printed thereon the words "shares \$1 each," and by other matters.

SAME — ESTOPPEL — VOTING STOCK AFTER ATTEMPTED RESCISSION. A person to whom mining stock has been fraudulently sold, and who has sought a rescission of the sale, tendering back the stock, is not estopped to insist upon a rescission by the fact that she attended a stockholders meeting and voted the stock after the commencement of the action.

¹Reported in 82 Pac. 1000.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered April 18, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for the rescission of a sale of mining stock. Reversed.

John M. Boyle and Roberts & Leehey, for appellant.

John A. Shackelford and A. H. Denman, for respondent.

Root, J.—Appellant came to Tacoma from Pennsylvania in May, 1901, being then about sixty-six years of age, and being nearly seventy at the time of the trial of this cause. She had about \$11,000 in money, after buying a home. Respondent was a real estate and investment agent; also, an admitted attorney at law, but not engaged in general practice. He having been recommended to her as a man of reliability, she employed him to examine an abstract of certain property which she had bought, or was intending to purchase. Subsequently she invested considerable money in warrants and delinquency tax certificates, this all being done through respondent. In January, 1902, she purchased from or through respondent five thousand shares of mining stock, for which she paid \$5,000 in cash. She claims that respondent represented to her, as follows: That he was buying this stock for her from the mining company; that the stock was very valuable; that the company had valuable improvements upon its property and would pay monthly dividends at the rate of ten per cent per annum upon her stock; that she would obtain the first dividend during the next month, February. She testified that she was reluctant to make the investment, but was strenuously urged by him to so do, and made the purchase upon his advice, representations, and urgent request. Many of the representations which she claims that he made were, if so made, untrue.

Her testimony in support of all these contentions was disputed upon its material points by respondent. The latter

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claimed that appellant came to see him one day and asked if he knew of a good investment for her, saying that she for some reason disliked to be buying warrants and delinquency certificates as she had been doing, but preferred some other form of investment; that he told her he would sell five thousand shares of this mining stock to her for \$5,000, and told her honestly and fully of the condition of the mining company and its prospects so far as he knew; that she took time to consider the matter, returning to talk it over two or three times before buying. Her contention and evidence was that she was relying upon respondent as her attorney and agent; whereas, respondent claims and testified that he was not her agent or attorney, and that there was no confidential relation or fiduciary capacity existing. The undisputed evidence of other persons adduced at the trial shows that the company was not selling any stock for more than fifty cents per share. Appellant maintains that she did not know that she was buying the stock from respondent; that he never told her that it was his stock, but did represent to her that he was buying it from the company, and that it cost \$1 per share. Respondent denied that he had made investments for appellant, but claims that all of their dealings were such that, at the time of this stock transaction, there was no relationship of principal and agent, attorney and client, or other confidential or fiduciary capacity.

It appears from the evidence that appellant, some time after this sale, requested respondent to write a letter to a friend of hers in Pennsylvania informing the latter of appellant's business affairs and investments. Complying with this request, respondent wrote, as he admits, the following letter:

"Tacoma, Washington, February 11, 1902.

"Miss S. J. McIlwaine, Pittsburg, Penn.

"Dear Madam:—Mrs. Martha I. Landis, for whom I have been doing some business of late and making for her some investments, has frequently mentioned your name and said

to me that, if at any time I cared to drop you a line concerning her business, that to let you know about it the same as if it was being told to her, that you was a person in whom she had the utmost confidence and that you was her best friend.

"Now on such a good recommendation and with her permission I will say the Mrs. Landis' investments have been of three kinds, to wit: County tax certificates that draw a rate that net to Mrs. Landis ten per cent on her money, and are sure and safe, the second class of investment is county warrants that are purchased so as to make a rate on the investment of eight per cent and some times it happens to run much higher; for instance on one lot of warrants that were bought for \$307.40 on October 15th, 1901, were called on the 10th of this month and the net profit will be \$24.30, which makes the investment yield her a rate of about 30 per cent on the investment; of course not all of the rest of the warrants can be expected to do so well but in each investment they will exceed the eight per cent counted on, to make this rate run so high I buy the warrants from persons who want to use their money for other purposes and sell at a discount. The third class of investment was in some stock of a gold mine near Ketchikan, Alaska. This mine I have been watching for some time and upon learning of its proven richness bought \$5,300 of the stock myself, and then I persuaded the owners who did not care to sell stock to let me have some for Mrs. Landis, and finally they consented to let it go, and on this stock Mrs. Landis gets a sure ten per cent dividend which is paid monthly and when the final dividend is paid between now and January 1st, 1903, she gets all over the ten per cent, the former part of the dividend I advance to her until the stock proves itself and runs above ten per cent.

"I am expecting to get for my stock at least three dollars for one within two years. I have lived in Tacoma since 1883 and this is the first time that I ever invested in mining stock, and you may feel sure that the mine must have been very good indeed to have induced me to take stock. I think that of all the investments that Mrs. Landis has this will be by far the most profitable one.

"With this much I will close for this time, and will be

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ready to give other information that you may care to know. Yours Respty., J. A. Wintermute."

To our minds this letter furnished potent corroboration of appellant's testimony. That respondent had made investments for her, and that the relationship of attorney and client or principal and agent existed between them clearly appears from a reading of this letter. From the evidence in the case, it appeared that once a month for two years or more after the sale, respondent paid to appellant the monthly proportion of the ten per cent dividend which she claims he had told her would be paid by the company upon this stock if she purchased it. She supposed that these monthly payments were the dividends being paid on account of her stock. Respondent claims that he advanced these to her as a matter of courtesy on account of her having but little money on hand, expecting to be reimbursed when the company should get upon a paying basis. As a matter of fact, the company paid no dividends. Appellant now claims that the making of these monthly payments was for the purpose of allaying any suspicion she might have, and of preventing her from investigating the circumstances surrounding the purchase of the stock and ascertaining the true facts as to its ownership, value, and selling price.

It appears from the evidence that this mining company had some claims upon which it had done work and made improvements to the extent of twelve or fifteen thousand dollars, and that the tests made of the ore and the veins were such as to reasonably induce the belief that the property was valuable; that \$2,800 worth of gold had been extracted from ore which had been taken from the claims, and that the prospects of the stock becoming valuable were good.

The case was tried in the superior court before the judge without a jury, and at the close of the evidence the case was dismissed for the reason assigned by the trial judge that he did not think plaintiff had made out a case. We have

been unable to arrive at the same conclusion. From the evidence, taken as a whole, having in mind the motives and inducements that ordinarily actuate people, we cannot believe that appellant would have paid \$1 per share for this stock, when its highest selling price was only fifty cents per share, had she not been misled. We can hardly believe that appellant would have invested \$5,000 in a purchase of mining stock from respondent if she had known that it belonged to respondent, without having made some inquiry and investigation concerning the company, of some other person having knowledge of its property and affairs. At least, it hardly seems credible that she would thus have made a purchase of his stock unless the relationship existing between them was of such a confidential nature as to induce her to rely upon his representations concerning the matter. It is not claimed that she knew anything about this company, or that she ever heard of it prior to the time respondent mentioned it to her. It appears from the evidence that she had been a farmer's wife, and that her experience in business matters was limited to those matters appertaining to the carrying on of a farm, and to looking after such notes and mortgages as secured the extra money which she possessed. It appears that she knew nothing whatever about mining companies, and was unfamiliar with the methods of business ordinarily obtaining among them; that she had never seen a certificate of stock prior to the purchase made herein.

We are not disposed to believe that respondent thought appellant was making a purchase of worthless stock. We think that he believed this stock to be valuable, and that it would become more valuable and make her a profitable investment. But the error of respondent was in not fully revealing to appellant all of the facts, and especially those as to his own relationship to this stock, and in making a profitable (to himself) sale to one who, upon the strength of the confidential relations existing between them, became the purchaser. Here was an old lady for whom he had been doing business—

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engaging in transactions wherein she had relied upon his honesty and ability, and by reason of which she had come to feel that she could trust him. Even if he believed that the stock was valuable and would become much more so, nevertheless he knew that he was selling to this appellant for \$1 per share that which had cost him only half that sum; that he was making a sale which he could not have made but for the trust and confidence which she had in him and the representations which he had made.

One who acts as an attorney for a client, or as an agent for a principal, should not only be absolutely honest, but should use the utmost effort to make the dealings fair, frank, and honorable; and this is especially true in dealings with one inexperienced or otherwise incapable of self-protection. And in transactions between attorneys and clients, or principals and confidential agents, courts will not be astute to find or recognize technicalities and subtle distinctions by means of which such attorneys and agents may escape the responsibilities resting upon them. The fact that the past transactions of the parties have been such as to awaken in the one a feeling of confidence and trust toward the other, and that by reason of that faith such an one is further relied upon, goes a long way toward showing the latter transaction to be one arising from a confidential relationship. Where such relations are shown to exist, the burden of showing the good faith of the transaction is upon the one asserting it. 14 Am. & Eng. Ency. Law (2d ed.), 194.

Not overlooking the kindly purposes respondent may have had in this transaction, we are nevertheless of the opinion that the circumstances inducing appellant to make the purchase of this stock were such that she was entitled, upon learning the real facts, to rescind said sale and have a return of the purchase money.

“A stock broker, in making sales or purchases for a client, may not act as both principal and agent in the same transaction without his client’s assent given upon full knowledge

of the facts. If he assumes to do so the client may either repudiate the transaction or may affirm it and hold the broker to the price reported. . . . Also, the broker may not act as agent for both the buyer and seller in the same transaction. In each of the cases above mentioned it is immaterial whether or not there was actual fraud intended or actual injury done, such dealings being prohibited upon grounds of public policy." 26 Am. & Eng. Ency. Law (2d ed.), 1063.

Story, Equity Jurisprudence (12th ed.), at § 465, says: "One sustaining a relation of trust is never allowed to make any profit for himself." And the same author, at § 315, says: "There must be entire good faith and a full disclosure of all facts and circumstances." And at § 316: "If an agent sells to his principal his own property as the property of another, without disclosing that fact, the sale is void." In the case of *Ruhl v. Mott*, 120 Cal. 668, 53 Pac. 304, the supreme court of California said:

"Equity always views with strictness the business dealings of a man with one who stands in a position of dependence or confidence to him, when that relationship is either voluntarily assumed or is imposed by operation of law."

It is urged by respondent that appellant, after discovering, or being in a position to discover, the real facts as to the stock and the mining company, neglected for a long time to rescind, but continued to receive the monthly payments which respondent was making in lieu of dividends. It appears that, after she had been informed that this stock had been sold by the company for fifty cents a share, instead of one dollar, she called upon respondent and asked to see his certificates of stock. They were shown to her. She saw printed upon these certificates the words, "Shares \$1 each." From this she inferred that his shares had cost \$1 each, being inexperienced, and not knowing that these words indicated the par value of the stock rather than its selling price. This and other matters allayed her suspicions temporarily, and delayed her taking action in the matter. But we do not think

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her conduct and delay amounted to a waiver of her right to rescind.

It also appears that, after the commencement of this action, appellant attended one of the meetings of the stockholders of this mining company, and participated therein as an owner of this stock. It is contended by respondent that this amounts to a ratification of the purchase, and a waiver of any rights which she might have had to a rescission. We do not think that this action of the appellant constituted an estoppel. She had tendered this stock to respondent prior to the commencement of this action, and demanded the return of her money, which had been refused. She was therefore left in possession of the stock. The voting of it at the meeting in our opinion does not militate against her rights in this action. In fact, we are not sure but that it was her duty as the holder of that stock to be at said meeting and vote the same in the interests of the company, instead of remaining absent and neglecting the interests represented by said stock. 1 Cook, Corporations (4th ed.), § 356, says:

“Where a party has a right to return the stock and receive back his money, he may, after making a tender, do any acts in regard to the stock reasonably necessary to protect his interest, and yet not lose his right to rescind.”

The judgment of the honorable superior court will be reversed, and the cause remanded with instructions to enter a judgment in favor of appellant in a sum equal to the difference between \$5,000 and the total amount paid by respondent to the appellant in the monthly payments referred to, interest on neither sum; the stock and certificates representing the same to be delivered to, and become the property of, the respondent upon his satisfying said judgment. Costs to appellant.

MOUNT, C. J., CROW, DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 5798. Decided December 13, 1905.]

THE STATE OF WASHINGTON, *on the Relation of C. W. Ide, Respondent*, v. CHARLES E. COON, *as Mayor of the City of Port Townsend, et al., Appellants.*¹

APPEAL—DISMISSAL—AMOUNT IN CONTROVERSY—JURISDICTIONAL REQUISITE—MANDAMUS TO ENFORCE A JUDGMENT AGAINST A CITY FOR LESS THAN \$200. Where the amount in controversy is less than \$200, an appeal does not lie from a judgment of the superior court awarding a writ of mandate to compel the city officers to issue a warrant to pay a judgment, although the judgment was one entered by the supreme court for costs against the state, in an action prosecuted by the city, and the legal contention was involved that the city was not liable on the judgment.

Appeal from a judgment of the superior court for Jefferson county, Hatch, J., entered May 19, 1905, after a hearing on the merits, granting a writ of mandate directing the issuance of warrants in payment of a judgment against a city. Appeal dismissed.

A. W. Buddress, for appellants.

Coleman & Ballinger, for respondent.

DUNBAR, J.—Relator was found guilty of not paying a poll tax, which was alleged to have been levied under an ordinance of the city of Port Townsend, upon certain male inhabitants. From that judgment he appealed to this court, where the judgment was reversed and the costs were awarded in his favor against the state of Washington, the title of the case being *State of Washington, Plaintiff, v. C. W. Ide, Defendant*. [35 Wash. 576, 77 Pac. 961.] In reversing the case, this court awarded judgment in favor of Mr. Ide and against said respondent there, said state of Washington. The remittitur was duly sent down and entered in the execution docket of the superior court, and was satisfied of record, a certified copy of the remittitur and a certified copy of the

¹Reported in 82 Pac. 993.

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docket showing such satisfaction were presented to the mayor and clerk, and a warrant was demanded in payment of the judgment for costs, which was refused. Thereupon, a proceeding in mandamus was commenced against the appellants, and from a judgment directing the issuance of the warrant for costs of this proceeding, this appeal is prosecuted.

The petition of the relator alleged, that the city of Port Townsend was the party who prosecuted the action against the relator; alleged, as a pretext for refusal to pay the costs, that the judgment was a judgment against the state of Washington and not against said city; that the prosecution was in the interest of the said city; that the prosecution was by the city attorney, from its inception to the trial in the supreme court; that the city by its attorney appeared in the supreme court and contested the appeal of relator, and filed a brief therein; that said city paid the costs and expenses of resisting said appeal. There are no allegations in the answer that affect the questions involved here. Upon the issues made by the pleadings, judgment was entered in favor of the relator, respondent in this case, and against the mayor and clerk for costs; and from that judgment the mayor and clerk prosecute this appeal.

The amount involved in the petition was \$115, and upon the calling of the case in this court for oral argument, on the 14th day of November, 1905, the respondent moved to dismiss the appeal for the reason that this court had no jurisdiction to hear the same, the amount involved falling within the provision of art. 4, § 4, of the constitution, which provides:

“The supreme court shall have . . . appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars.”

The court was of the opinion that the motion should be sustained, but granted the appellants time to file a brief on

that proposition. The brief has been received, and an earnest effort has been made by counsel for appellants to distinguish this case from the case of *State ex rel. Plaisie v. Cole, ante*, p. 474, 82 Pac. 749.

The main contention of appellants is that the mandamus proceeding in this case was a proceeding to enforce an execution on the judgment of this court, and not in any sense a civil action for the recovery of money; that the judgment of this court, having been a judgment for costs against the state, it cannot be recovered against the city; and that this court has power and jurisdiction at all times and under all circumstances to enforce its judgments; and the case of *State ex rel. Jefferson County v. Hatch*, 36 Wash. 164, 78 Pac. 796, is cited to sustain the contention. But that case, it seems to us, is not in point, for the reason that it was a direct application in this court to compel an obedience to the judgment of this court. The case of *State ex rel. Plaisie v. Cole, supra*, was a mandamus case to compel a justice of the peace to grant a change of venue, and we held there that, inasmuch as the amount in controversy in the original action was less than \$200, this court would not take jurisdiction of the appeal under the constitutional provision above referred to, and the case of *State ex rel. Dudley v. Daggett*, 28 Wash. 1, 68 Pac. 340, was overruled. In that case it was held that, where a mandamus was sought for the purpose of compelling the proper city officers to issue a warrant for the payment of an officer's salary, the amount involved being less than \$200, this court would take jurisdiction of an appeal in the case on the ground that mandamus is not a civil action at law for the recovery of money, within the meaning of the constitutional provision limiting the jurisdiction of this court. The court then returned to the announcement made in its former decisions, viz., *State ex rel. McIntyre v. Superior Court*, 21 Wash. 108, 57 Pac. 352, and *State ex rel. Wallace v. Superior Court*, 24 Wash. 605, 64 Pac. 778, where the doctrine was announced that the constitutional limitation ap-

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plied to cases that were brought in the form of mandamus the same as any other civil action.

The mandamus proceeding was instituted in this case to determine a legal question, viz., whether the city should pay the costs of the preceding suit by reason of the fact that it was the complaining witness and was liable therefor when the prosecution failed. But it is not the legal question involved in a case which is the test of the jurisdiction of this court, but the amount involved. There are legal questions involved in every case of mandamus, and the case of *State ex rel. Dudley v. Daggett, supra*, which was overruled in *State ex rel. Plaisie v. Cole*, was as much a case for the enforcement of an execution as the case at bar. Here the action was to obtain a warrant to satisfy an alleged judgment. There it was to obtain a warrant for the payment of an alleged salary. Here the legal contention was that the city was the real party in interest, and therefore liable for the costs. There the legal contention was that the relator was not an officer entitled to receive the salary. In both cases there was a legal controversy to be determined. Those questions having been submitted to the superior court, and the amount claimed not exceeding \$200, under the construction placed upon the constitution in *State ex rel. McIntyre v. Superior Court, supra*, they were intrusted exclusively to the judgment and disposition of the superior court. In that case it was said:

“The idea of the constitution evidently is that cases involving small amounts can safely be entrusted to the final judgment of the superior court, and that as to such cases the superior court is the court of final determination.”

Outside of the question of the power of this court to enforce its own judgments, which as we have seen is not involved in this case, this suit would be like any other suit on a judgment. If it were a judgment from a sister state that was sued upon for less than \$200, it would not be claimed

that this court would have jurisdiction on appeal from a judgment rendered in that suit. There is no more reason why jurisdiction should attach when the suit is upon a judgment from this court.

We conclude that the motion is well taken, and must be sustained. The appeal is dismissed.

MOUNT, C. J., ROOT, CROW, RUDKIN, and HADLEY, JJ., concur.

[No. 5800. Decided December 12, 1905.]

JOHN SENGFELDER *et al.*, Respondents, v. POWELL-SANDERS COMPANY, Appellant.¹

APPEAL—APPEALABLE ORDERS—VACATION OF JUDGMENT BY SEPARATE ACTION. An order vacating a judgment is not appealable as a final order when its effect is to grant a new trial and not to terminate the rights of the party, although made in a separate action to set aside the judgment.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered March 20, 1905, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to vacate a judgment. Appeal dismissed.

Cullen & Dudley, for appellant.

R. J. Danson, for respondents.

DUNBAR, J.—This is an appeal from an action of the superior court of Spokane county vacating a judgment. Respondents move to dismiss the appeal, for the reason that an order vacating a judgment is not appealable. That an order vacating a judgment is not appealable is the settled law of this state. See, *Freeman v. Ambrose*, 12 Wash. 1, 40 Pac. 381; *Nelson v. Denny*, 26 Wash. 327, 67 Pac. 78. Of course,

¹Reported in 82 Pac. 931.

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there might be a case where the vacation of a judgment would terminate the rights of a party, and which could not be reviewed on appeal. In such case the vacation and order vacating a judgment would be appealable. But that question is not involved in the case at bar. The appellant undertakes to escape the result of the rulings of this court by insisting that, inasmuch as this is a separate action for the vacation of a judgment and not an action in the original case, it does not fall within the rule established by this court. But this question has also been many times passed upon by this court, and in *Reitmeir v. Siegmund*, 13 Wash. 624, 43 Pac. 878, the court said:

"We held in *Freeman v. Ambrose*, 12 Wash. 1, 40 Pac. 381, that an order of this kind, when made upon motion in the original action, was not appealable. But it is claimed by the appellants that from the fact that this order was made in an original proceeding instituted for the purpose of having the judgment vacated, it does not come within the rule announced in that case. No good reason can be given for the distinction thus sought to be made. The object is the same whether the proceeding be by motion in the original case or by petition in a new one, and the effect of the order, whether made in one proceeding or the other is the same."

See, also, *State ex rel. Post v. Superior Court*, 31 Wash. 53, 71 Pac. 740; *Post v. Spokane*, 35 Wash. 114, 76 Pac. 510.

Outside of authority, it is manifest that the only result of the action in either case is to obtain a new trial. Hence, it is in effect a proceeding in the case, and the form of the action is entirely immaterial.

The motion to dismiss will be sustained.

MOUNT, C. J., ROOT, CROW, RUDKIN, and HADLEY, JJ., concur.

[No. 5905. Decided December 13, 1905.]

SARAH HESSER, *Respondent*, v. WATSON H. BROWN,
Appellant.¹

MORTGAGES—SATISFACTION—CONVEYANCE TO MORTGAGEE—DEED ABSOLUTE ON FAILURE TO REDEEM—CONTRACT FOR REDEMPTION—CONSTRUCTION—EVIDENCE. A deed absolute in form in consideration of the amount due to the grantee upon a mortgage past due, should not be considered as a mortgage, although a contract made at the same time gives the grantor one year in which to redeem from the debt, and provides that the mortgage is to be kept alive, where the note and mortgage were surrendered to the maker, and the land was taken possession of by the grantees, who paid the taxes, made improvements and treated it as their own, and where the grantor abandoned the same and made no offer to pay the debt, or any claim to the property for seven years, when action for the debt was barred by the statute of limitations.

Appeal from a judgment of the superior court for King county, Yakey, J., entered June 29, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

C. W. Turner (*Daniel Kelleher*, of counsel), for appellant.

Fred H. Peterson and *H. C. Force*, for respondent.

FULLERTON, J.—This is an action of ejectment, brought to recover the possession of certain real property situated in the city of Seattle. From the record it appears that on April 11, 1894, the appellant borrowed from one Peter Hesser, then the husband of the appellant, the sum of \$200, giving his promissory note therefor, and securing the payment of the same by mortgage on the property in dispute. On July 29, 1897, the note being then overdue and unpaid, the appellant conveyed the property to Hesser for the recited consideration of \$284, that being the amount of principal and interest then due upon the note and mortgage. At the same

¹Reported in 82 Pac. 934.

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time Hesser and wife executed and delivered to the appellant the following contract:

"Whereas, Watson H. Brown has this day conveyed by his deed of this date to Peter Hesser, of Ballard, Wash., property heretofore mortgaged by him to said Hesser, which deed is intended as better security, and the mortgage mentioned to be meanwhile kept alive. Now, therefore, said Hesser, and Sarah his wife, in consideration of the foregoing premises, have agreed, and do hereby agree, to reconvey said property to said Brown, his heirs or assigns, one year from date on payment by him, his heirs or assigns, to them one year after this date of said mortgage debt now amounting to two hundred and eighty-four dollars (\$284) with interest from this date at the rate of twelve per cent per annum. The property above mentioned is situated in King Co. Wash., and is described as follows, to wit: All of Lot One (1) in Block A of Hamblet's Acre Garden. It is further agreed that all taxes and other necessary expenses shall be added to the above purchase price."

The appellant never redeemed, or offered to redeem, under the contract, but on October 10, 1904, finding no one on the property, he entered and took possession. Subsequent to the execution of the deed, the respondent and her husband treated the property as their own. They paid from community funds all the taxes and assessments that were levied against the same until August, 1902, when it was awarded to the respondent in a decree of divorce, granted the respondent in an action therefor between herself and her husband, since which time such taxes and assessments have been paid by the respondent.

The foregoing facts are not disputed. In addition thereto, the respondent contended, and the court found, that the note and mortgage evidencing the debt were surrendered to the appellant at the time of the execution of the deed; that the land was worth no more at that time than the amount due upon the note and mortgage; and that the respondent, after acquiring the property as her separate property, entered into

possession of it and made improvements thereon, and was in such possession until ousted by the entry of the defendant. The appellant challenges these findings, but as they are supported by the evidence of disinterested witnesses, and opposed only by the evidence of the appellant, we shall not disturb them.

The question then is, did the court err in adjudging the respondent to be the owner of the property in dispute? The appellant contends that the contract executed and delivered him by the respondent and her husband, at the time of the execution and delivery of the deed, made that instrument a mortgage, and being such, no rights to the property could be acquired thereunder without foreclosure, in the manner provided by law. Doubtless some of the recitals in the contract to reconvey do lend color to the claim that the deed was intended as security for a debt, and hence, was a mortgage; but as the contract is on its face ambiguous, these recitals are not of themselves conclusive, and not being so, they must yield to more convincing evidence to the contrary. To our minds the conduct of both parties is utterly inconsistent with the idea that a mortgage was intended. The note and mortgage which the contract recites are to be kept alive were surrendered up and destroyed. The grantees in the deed immediately assumed ownership of the property, and exercised such acts of ownership over it as persons in their situation usually do of vacant land owned by them; they gave it in to the assessor as their property, and paid the taxes assessed thereon. The appellant, on the other hand, abandoned it. He did not pay, or offer to pay, either the accumulating interest on the debt he now claims he owed, nor did he pay or offer to pay the yearly accruing taxes. And it is only after a lapse of more than seven years, after the debt secured by the mortgage, if it be one, is barred by the statute of limitations, and after the property has shown a sharp increase in value, that he asserts ownership over it. This is

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not conduct consistent with a good faith claim of ownership of property.

"One who alleges that his deed in absolute form was intended as a mortgage only, is required to make strict proof of the fact. Having deliberately given the transaction the form of a bargain and sale, slight and indefinite evidence should not be permitted to change its character. The proof must be clear, unequivocal, and convincing. The fact that the grantor understood the transaction to be a mortgage is not alone sufficient to prove it to be so." Jones, Mortgages (6th ed.), § 335; *Dabney v. Smith*, 38 Wash. 40, 80 Pac. 199.

The judgment should be affirmed, and it is so ordered.

MOUNT, C. J., RUDKIN, HADLEY, CROW, and ROOT, JJ., concur.

[No. 5879. Decided December 13, 1905.]

MARIA KELLY *et al.*, Appellants, v. GRAND CIRCLE WOMEN OF WOODCRAFT, Respondent.¹

INSURANCE — BENEFICIAL ASSOCIATIONS — EXPULSION OF MEMBER — JURISDICTION OF COURTS TO REVIEW. The expulsion of a member from a mutual benefit association will not be reversed by the courts except to ascertain whether the proceedings were regular, in good faith, and not in violation of the laws of the land.

SAME — REGULARITY OF PROCEEDINGS — CHARGES — SUFFICIENCY. Charges of a general nature, preferred against a member of a mutual benefit association, accusing the member of threats to wrongfully use the funds, and slandering other members and officers, are sufficient to sustain an order of expulsion from the association, where the member did not point out wherein they should be made more specific.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 9, 1905, upon motion of the defendant at the close of plaintiffs' case, dismissing an application for a writ of mandamus to compel reinstatement in a fraternal insurance society. Affirmed.

¹Reported in 82 Pac. 1007.

S. S. Bassett and *John P. Judson*, for appellants.

A. D. Stillman and *Denton M. Crow*, for respondent.

MOUNT, C. J.—Appellant Maria Kelly was expelled from membership in Beta Circle No. 330, Women of Woodcraft. Thereafter she applied to the superior court of Spokane county for a writ of mandamus, directed to the respondent, to reinstate her in the order, claiming that she was wrongfully expelled, and had been thereby damaged in a large amount. An alternative writ was issued. In answer to this writ, the respondent denied the material allegations of the writ, and alleged affirmatively that appellant was properly expelled from the order, in substantial compliance with the laws thereof. The cause came on for trial. Appellant demanded a jury, which was refused. The court thereupon heard all the evidence of the appellants and, on motion of respondent, dismissed the proceedings. From this judgment of dismissal, the appeal is prosecuted.

The facts, as they appeared upon the trial, are substantially as follows: The respondent is a social, fraternal, and mutual benefit insurance society, incorporated under the laws of Colorado, and authorized to do business in this state. The supreme controlling body is known as the Grand Circle Session, which is composed of members elected by subordinate circles, and which is presided over by an officer called the Grand Guardian, who has general charge of the Grand Circle. In different states are subordinate lodges, called Circles, presided over by an officer known as the Guardian Neighbor. Beta Circle No. 330 is one of these subordinate circles, located at Spokane. Appellant was a member of Beta Circle No. 330, and held a policy of insurance in the order for \$1,000.

The business of the lodges and the rights and liabilities of all members are controlled by by-laws, a copy of which is found in the record. These by-laws provide, among other things, as follows:

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"Sec. 15. As soon as information, either verbal or written, is received by her, the Guardian Neighbor (or when the Guardian Neighbor is charged, or is absent and unable to act, then the Adviser) shall refer the matter to a special committee of three Neighbors, to whom she shall communicate all that she has learned, concealing the name of the informant, if so desired.

"Sec. 16. Said committee shall diligently investigate the matter referred to them, and if they find sufficient grounds, shall prepare charges as follows: 'We, the committee to whom was referred certain accusations against Neighbor _____ have investigated the matter and deem it our duty to charge _____ with [here state the acts or offenses and the dates, as nearly as may be possible, when said offense was done], and recommend that the Circle investigate the same. We would cite as witnesses in the case the following names: [Here give names.] Signed this _____ day of _____, 19____. [Signed by Committee.] Said charges shall be filed or a report of the committee be made why same should not be done, at the next regular meeting after the accusation has been referred to said committee.

"Sec. 17. Charges having been filed with the clerk, he or she shall read the same under head of 'General Business,' and shall make a copy of the same, excepting the names of the committee, and the Attendant shall deliver said copy to accused, if he or she resides in the city, or mail it to his or her last known address, together with a notice to appear at a regular or special meeting to be held not sooner than a week after the one in which charges are read, and instructing him or her to be present with any witnesses or documents necessary in his or her defense.

"Sec. 18. Trial should be had at a regular or special meeting to be appointed by the Guardian Neighbor, and be held at least one week after charges are preferred. The accused may appear in person or by a Neighbor, and the Banker, or in his or her absence, the Adviser, shall assist him or her in interrogating witnesses. The Guardian Neighbor shall question witnesses, and the accused or his or her assistants may cross-question the witnesses. Should any of the witnesses not be members of the Fraternity, they may be invited in and examined before members are examined, and in their presence, any reference to the secret work shall

not be permitted. The case may be postponed from time to time by a two-thirds vote of the members present.

"Sec. 19. After all evidence is in, the Guardian Neighbor, or, in proper case, the Adviser, may discuss the matter, and one Neighbor on behalf of the accused, may reply, and the accused may also be heard in his or her own behalf. He or she shall then retire to the ante-room, and the Neighbors can discuss the matter, but shall be confined to five-minute speeches.

"Sec. 20. After discussion, the matter shall be put to a vote on the question, Is he or she guilty as charged? And if convicted, on the following questions: First—Shall he or she be expelled? If two-thirds vote 'Yes,' he or she shall be expelled; otherwise, the question shall be: Second—Shall he or she be suspended from the Circle?"

In September, 1901, charges were preferred against appellant Maria Kelly, and a committee was appointed to investigate the same. This committee made a report as follows:

"We, the committee to whom was referred certain accusations against Neighbor Maria Kelly have investigated the matter and deem it our duty to charge her with making threats to use the funds of the Circle regardless of her right to do so, and of slandering several members of Beta Circle, and of the Grand Officers of the order. We, therefore, recommend that the Circle investigate these charges."

A copy of this report was served upon the appellant personally, and she was summoned to appear before the lodge for trial on October 2, 1901. She appeared at that time and objected to the proceedings upon the ground that there were no charges against her. The objection was overruled, and the trial proceeded. Appellant heard the witnesses and was given an opportunity to cross-examine them, but did not do so. She was permitted to and made statements in her own behalf. Thereupon, after she had retired from the lodge room, a rising vote was taken upon the question, Is she guilty as charged? which resulted twenty "Yes," and six "No." Another vote of the same kind was taken upon the question, Shall she be expelled? with the same result as before. Ap-

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pellant was thereupon ordered expelled from the Circle. She appealed from that order of her Circle to the Grand Guardian, who in a written opinion, sustained the appeal upon the ground that the vote was not taken in accordance with the provisions of the by-laws, but denied the appeal upon other grounds, and sent the case to Beta Circle No. 330, and directed that the vote be taken by ballot, as required by the by-laws.

The case again came up in said Beta Circle on November 5, 1902. Appellant was present. A motion was made to dismiss the charges, but this motion was by the Guardian Neighbor declared out of order, and a ballot was thereupon taken, which resulted in her expulsion. Appellant thereupon appealed to the Grand Guardian on the ground that, when the case was remanded upon first appeal, appellant was entitled either to a new trial or to a dismissal of the charges. The Grand Guardian, in a written opinion, denied the grounds of the appeal, and affirmed the expulsion of the appellant. She thereupon appealed to the Grand Circle Session, which appeal was referred to a committee on laws and grievances. That committee, after a hearing at which appellant was represented, reported a recommendation to the Grand Circle Session that the Grand Guardian be sustained, which report was adopted. Thereafter this action was begun as hereinbefore stated.

In cases of this kind "courts never interfere, except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society, whether or not the proceeding was in good faith, and whether or not there was anything in the proceeding in violation of the laws of the land." *Connelly v. Masonic Mut. Benefit Ass'n*, 58 Conn. 552, 18 Am. St. 296, 9 L. R. A. 428. The rule is stated in 3 Am. & Eng. Ency. Law (2d ed.), 1075, as follows:

"Where the jurisdiction of an association is being lawfully and regularly exercised, courts have no authority to

interfere by injunction, mandamus, or otherwise, nor have they authority to entertain jurisdiction of a cause once formally and finally settled according to the laws of the association, unless it appears that such laws were invalid, or that the procedure under them was so irregular as to work injustice. It follows as a corollary that courts have no authority to entertain jurisdiction of a cause that is primarily cognizable, and for which a full and ample remedy is obtainable, under the associate jurisdiction."

See, also, 2 Bacon, Benefit Societies and Life Insurance (3d ed.), § 442; *Murray v. Supreme Hive L. O. T. M.*, 112 Tenn. 664, 80 S. W. 827; *Levy v. Magnolia Lodge I. O. O. F.*, 110 Cal. 297, 42 Pac. 887; *Moore v. National Council*, 65 Kan. 452, 70 Pac. 352; *Dubcich v. Grand Lodge A. O. U. W.*, 33 Wash. 651, 74 Pac. 832.

As we understand the case presented here, there is no contention on the part of the appellants that the laws of the order are invalid, but the whole contention is based upon the idea that the procedure was irregular and not in good faith. Upon a careful examination of the record, we find no evidence of bad faith. The only questions, therefore, for our consideration are upon the regularity of the proceedings. Appellant contends that the charges upon which she was expelled from Beta Circle were not sufficiently specific, and that therefore the charges amounted to nothing, and that the Circle had no jurisdiction to try her upon any charge, or to expel her from the order.

After the appellant had been served with notice of the charges, she appeared at the meeting fixed for the trial and, in answer to a question whether or not she was ready for trial, replied,

"Certainly not. There are no charges in this lodge against me, and you cannot try a person without charges. If I have done anything unbecoming a member of this order, prefer your charges according to the constitution and I will be ready for trial."

It is true, the charges contained in the report of the investigating committee were general in their character, and did not state the dates nor the particular persons who were slandered, but the general charges were made that the accused was making threats to use the funds of the Circle regardless of the right to do so, and of slandering several members of Beta Circle and of the Grand Officers of the order, and the Circle was authorized thereunder to put the accused member on trial. She was served with notice, and appeared. She was advised of the general nature of the offenses and, no doubt, could have prepared a defense if she had one. The evidence does not disclose that she pointed out to the lodge wherein she desired the charges made more specific, but she stood upon her general objection that the Circle had no right to try her under the charges which had been preferred. If lodges of the character of this one are to be held to the strict rules of pleading in all cases, very few, if any, successful prosecutions of delinquent members could be made, because the membership is not as a rule composed of persons who are familiar with strict legal rules. The correct principle, we think, is stated in *Burton v. St. George's Society*, 28 Mich. 261, where it was said:

"As these are all proceedings under articles agreed to by all the members, it is necessary to consider them without too much regard to any technicalities; and to follow substantial justice more than form."

See, also, *Levy v. Magnolia Lodge, supra*. We are of the opinion, therefore, that the Circle had jurisdiction to put the appellant upon trial under the charges contained in the report of the committee, and, further, that the procedure worked no injustice upon appellant.

The principal contention of the appellants is based upon the question above discussed. There are other irregularities suggested in the briefs, but little or no reliance seems to be placed upon them. They were all considered upon the different appeals in the forum of the order, and in accordance

with the rules thereof, and passed upon fairly and with substantial justice to the appellant. We think none of them are meritorious, and no useful purpose would be subserved by discussing them. Upon the whole case the lower court properly dismissed the writ.

The judgment is affirmed.

DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 5793. Decided December 13, 1905.]

D. J. HEFFRON *et al.*, Respondents, v. LOUIS FOGEL *et al.*,
*Appellants.*¹

REFORMATION OF INSTRUMENTS—DEED—DIVISION LINE—MISTAKE—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. In order to reform a deed on the ground of mistake and misrepresentations of the vendors as to the boundary line, the proof must be clear and convincing, and is not sufficient, where three witnesses testify for the plaintiffs to the effect that the fractional part of the lots described in the deed was represented as coming to the line of a certain sidewalk, when in fact it fell two feet and nine inches short thereof, and four witnesses for the defendants contradicted the plaintiffs' evidence, and they were corroborated by the fact that the lines were known and marked, that the defendants could not have been mistaken and had no object in making such representations, as it was against their interests to do so, and would leave them a narrow strip of useless land upon the other side of the parcel conveyed.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered January 9, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to reform a deed. Reversed.

John C. Hogan, for appellants.

Ben Sheeks, for respondents.

¹Reported in 82 Pac. 1003.

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Opinion Per Root, J.

Root, J.—Appellants were the owners of two lots in Wetherwax & Benn's addition to the city of Aberdeen, which lots were each fifty by one hundred and thirty feet, the greater length being north and south. One of these lots bordered on the west side of G street, and was adjoined by the other upon the west. Along the end of these two lots on the north was an alley. This alley and G street were paved, and the sidewalk upon said street marked the eastern boundary line of said property. Prior to the events which gave rise to this action, these appellants had sold to one Curtis a parcel of land thirty-two feet in width off from the south end of their two lots; and another strip of land thirty-two feet wide and adjoining that of Curtis upon the north, they had sold to one Kaufman.

Upon the north thirty-four feet of these lots adjoining and to the south of the alley forming the north boundary of the entire tract, these appellants owned a house in which they made their home. Between this parcel and that sold to Kaufman there was a strip of land extending across the two lots and having a frontage of thirty-two feet upon said G street. This parcel of land with a house thereupon was sold and conveyed by appellants to respondents. Between the house thus sold and the house occupied by appellants, there was a board sidewalk about five feet wide, extending from G street to a point opposite the rear of said two houses, and which was used by the occupants of both. The difficulty causing this action arose from the question as to where appellants represented the division line to be between their property and that sold to respondents.

The latter claim that when they purchased the property, appellants informed them that the north line of the property they were buying was indicated by the north edge of the sidewalk lying between the two houses. Respondent Dan Heffron and his brother and a man by the name of Hilts testify that they went to look at the property before the sale

was made, and that appellant Louis Fogel then and there told them that the line ran along the north edge of said sidewalk. This is flatly contradicted by Mr. and Mrs. Fogel, appellants, and their son and daughter. These four persons testified that, prior to the purchase, respondent Dan Heffron came there once with a person other than his brother or Hilts, and once or twice alone, and that appellants showed him where all the lines were and pointed out to him the nails and brass tacks and notches in the sidewalk which indicated the points where the lines reached the street; that they also called his attention to the fact that the boards in the sidewalk along the street were each a foot wide, and that he could readily locate the lines by counting these planks; also, that measurements were made, while he was there, with a tape-line. Respondents dispute this.

The deed from appellants to respondents described this property as "the southerly thirty-two feet of the northerly sixty-six feet of lots 11 and 12, block 3," etc. This is an accurate description of the thirty-two feet lying immediately north of the property theretofore sold to Kaufman, and would leave appellants yet owning thirty-four feet off from the north end of said lots and adjoining the alley aforementioned. Respondents brought this action to reform said deed by having it describe the property conveyed as "the southerly thirty-two feet of the northerly sixty-three feet three inches of lots 11 and 12," etc. It will be seen that the effect of this would be to place the northerly line of respondents' property two feet and nine inches further to the north, where it would follow the northerly edge of said sidewalk. The case was tried before the court without a jury, and a decree and judgment was entered directing the reformation of the deed in accordance with the prayer of respondents' complaint, and awarding damages in the sum of \$7. From this an appeal is taken.

Ordinarily, before a court will reform a written instrument upon the ground of mistake, the evidence must be clear

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that said instrument does not express the agreement and intention of the parties. In this case, there being three witnesses testifying as to the representations, in favor of the respondents, and four in favor of the appellants, and there being nothing in the record to indicate that respondents' witnesses were any more credible than those of appellants, it could scarcely be said, from this evidence alone, that the description in the deed was erroneous, and that the same should be reformed. Where there is a conflict in the testimony of witnesses as to a material point, the court will naturally look to conceded or undisputed facts and circumstances in the case to see whether or not corroboration may be found for the testimony of either of the conflicting parties, and to determine as to whose evidence is most consistent with the unquestioned facts. By the testimony of appellants and their children which is corroborated by other witnesses outside of the family, it is shown that, prior to these negotiations with respondents, appellants had caused the lines of their property to be ascertained by measurement, and that one of said witnesses had marked the line between Curtis and Kaufman, had marked the north line of Kaufman's property, and the line between appellants' property and that subsequently sold to respondents, and had marked the corners; that, at the point where these division lines reached the sidewalk on G street, a notch had been made at each point of intersection and some nails and brass tacks driven in the sidewalk. That this had been done, of course, was known to appellant Louis Fogel at the time he was negotiating with respondents for the sale of this property. It therefore follows that, if said Fogel told appellants that the line of the property which they were buying followed the north line of said division sidewalk, he must have stated to them something which he knew to be untrue. Then the question might arise, Why would he thus attempt to deceive respondents? Why would he endeavor to sell to them a parcel of land encroaching two feet and nine inches upon the tract which he had reserved

for his home yard, and thereby leave a strip of land two feet and nine inches wide extending between the parcel sold and the land of Kaufman—a strip which would be to him practically valueless? Again, the sidewalk extending from the street to the rear of the two houses furnished access to both of these houses, and it would seem to be a most natural thing that said sidewalk should be built on the line. That appellants should desire to sell the land carrying all of this sidewalk, and thus deprive themselves of the use thereof, scarcely seems reasonable.

The trial court made no finding of fraud, but found that appellants were mistaken as to where the line ran between their property and that sold to respondents, and based its decree upon this theory. But the fact, as before stated, that appellants had caused this property to be surveyed and the corners and division lines to be theretofore marked upon the sidewalk, shows, to our minds, conclusively that they were not mistaken as to where their line was, and we can find no motive for appellants representing the line to be to the north of where it actually was. Where testimony is so absolutely irreconcilable as it is in this case, it is not an easy task for a court to determine what may be the exact truth of the matter. But in a case of this kind, where the reformation of a written instrument is asked, the law places upon the party seeking such modification the burden of establishing his contention by the clear preponderance of the evidence. In view of the contradictory character of the testimony, and of the further fact that, in our opinion, the undisputed facts in the case tend to corroborate the testimony of appellants more than that of respondents, we are led to believe that the honorable trial court was in error in its findings favorable to respondents.

The judgment appealed from is reversed, and the cause remanded with instructions to dismiss the action.

MOUNT, C. J., CROW, DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

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Opinion Per Curiam.

[No. 5505. Decided September 6, 1905.]

MARTHA A. SLAGHT, *Respondent*, v. NORTHERN PACIFIC RAILWAY
COMPANY *et al.*, *Appellants*.¹

Appeal from a judgment of the superior court for Whitman county,
Chester F. Miller, J., entered July 13, 1904. Affirmed.

John M. Bunn (*James B. Kerr*, of counsel), for appellants.

Thomas Neill (*W. E. McCroskey* and *A. A. Wilson*, of counsel), for
respondent.

PER CURIAM.—Affirmed on the authority of *Slaght v. Northern
Pac. R. Co.*, 39 Wash. 576, 81 Pac. 1062.

[No. 5788. Decided December 7, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. PEARL HOWARD,
Appellant.²

Appeal from a judgment of the superior court for Yakima county,
Rudkin, J., entered December 21, 1904, upon a trial and conviction
of the crime of robbery. Affirmed.

E. B. Preble and *D. L. Crowder*, for appellant.

PER CURIAM.—The questions presented in this case are the same
as those in case 5791, *State v. Smith*, ante p. 615, 82 Pac. 918, and for
the reasons therein stated will stand affirmed.

[No. 5792. Decided December 7, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES WILSON,
Appellant.²

Appeal from a judgment of the superior court for Yakima county,
Rudkin, J., entered December 21, 1904, upon a trial and conviction
of the crime of robbery. Affirmed.

E. B. Preble and *D. L. Crowder*, for appellant.

PER CURIAM.—The questions presented in this case are the same
as those in case 5791, *State v. Smith*, ante p. 615, 82 Pac. 918, and for
the reasons therein stated will stand affirmed.

¹Reported in 82 Pac. 1135.

²Reported in 82 Pac. 919.

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30. APPEAL—STATEMENT OF FACTS—TIME FOR SETTLEMENT. As Bal. Code, § 5058, fixes no time within which a statement of facts must be settled or notice of settlement given, the appellant may do so within a reasonable time, and the statement will not be struck out because not settled at the time of the service of briefs. *Floding v. Denholm*..... 463

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31. APPEAL—STATEMENT OF FACTS—ATTACHING EXHIBITS AND DEPOSITIONS AT TIME OF SETTLEMENT. Exhibits appropriately referred to in the statement of facts, and part of the records on file, need not be attached to the statement at the time it is served, but it is sufficient if they are attached at the time the statement is certified; and a statement to the effect that they were received in evidence is an appropriate reference thereto. *Thornley v. Andrews*.....:..... 580
32. APPEAL—STATEMENT OF FACTS—NOT PROPERLY INDEXED—GROUND FOR STRIKING. Failure to index a voluminous record is ground for imposing terms or striking the statement. *Bringgold v. Bringgold*..... 121
33. APPEAL AND ERROR—TRANSCRIPT—INDEX—SUFFICIENCY. A statement of facts will not be struck out for failure of the appellant to index the same where an index has been prepared by the clerk of the supreme court. *Smith v. Glenn*..... 262
34. APPEAL—DISMISSAL—RECORD SHOWING INSUFFICIENT BOND—SUPPLEMENTAL TRANSCRIPT. Upon a petition for a rehearing, after the dismissal of an appeal for insufficiency of the bond, the supreme court will, in order to support its jurisdiction, allow a supplemental transcript to be filed showing an error by the clerk of the superior court in entering the order fixing the amount of the supersedeas bond on appeal, from which it appears that the bond was sufficient; and on such showing the appeal will be reinstated. *Ames v. Kinnear*..... 646

VIII. BRIEFS.

35. APPEAL—ASSIGNMENT OF ERROR—SPECIFICATION IN BRIEF OF ERRORS ASSIGNED. The brief on appeal must specifically point out the errors alleged and refer to the record where the same can be found, in order to secure a review of the error assigned. *State v. Ilomaki*..... 629

IX. MOTIONS AND DISMISSALS.

Ruling on motion to dismiss as *res judicata*, see APPEAL AND ERROR, 42, 43.

36. APPEAL—DISMISSAL—MOTION DOCKET. A motion to dismiss an appeal not placed on the motion docket is technically not before the court upon the hearing on the merits, where respondent files no printed brief, but may be considered when principally relied on by the respondent. *Kubillus v. Ewert*..... 38
37. APPEAL—DECISION—GIVING RESPONDENT BENEFIT OF ERROR. Where there was no evidence to sustain a verdict against the defendant and his challenge to the evidence was improperly overruled, but a verdict for the plaintiff was set aside and a new trial granted on other grounds, the defendant is entitled, on appeal by the plaintiff, to a dismissal of the case. *Larson v. American Bridge Co.*..... 224

APPEAL AND ERROR—CONTINUED.

38. APPEAL—ABANDONMENT—RIGHT OF RESPONDENT TO DISMISSAL AND COSTS. The supreme court acquires jurisdiction of an appeal by the giving of notice and filing of a proper bond, after which the appellant cannot dismiss the appeal as a matter of right, and by service of notice; but the dismissal must be by order of court, and if not procured at the cost of appellant, the respondent may procure it with costs and an attorney's fee. *In re Seattle*..... 450
39. SAME—STATUTORY COSTS AND ATTORNEY FEE—AGAINST EACH OF SEVERAL APPELLANTS. Upon the dismissal of an appeal from an order of confirmation in a street condemnation proceeding, in which many of the property owners perfected appeals and then abandoned them, the respondent city is entitled to tax but one bill of costs and one attorney's fee. *In re Seattle*..... 450
40. APPEAL—CESSATION OF CONTROVERSY—SURRENDER OF PREMISES IN FORCIBLE ENTRY AND DETAINER. An appeal from a judgment for defendants in an action of forcible entry and detainer will be dismissed where, pending the action, the plaintiff conveyed the property to third persons, who intervened and to whom the defendants yielded possession upon demand before the hearing of the appeal; since there is no longer any controversy. *Stevens v. Jones*..... 484
41. APPEAL—DISMISSAL—DEFECTIVE BOND. An appeal will not be dismissed for defects in the appeal bond in that the names of two of the sureties had been erased, presumably after signature by the other surety, where the objection was not raised below, and where the other surety is estopped to question the bond by the filing of a certificate that it signed the bond as sole surety. *First National Bank v. Coles*..... 528

X. REVIEW.

- See BILLS AND NOTES, 2; CRIMINAL LAW, 8, 12-14, 19-21, 27-33; DIVORCE, 1, 2.
- Assessment for public improvements, see MUNICIPAL CORPORATIONS, 8-16.
- Conduct of counsel, see TRIAL, 2.
- Decision of county commissioners as to new school district, see SCHOOLS AND SCHOOL DISTRICTS, 4.
- Decision, law of case, see INJUNCTION, 1.
- Dismissal of attachment, see ATTACHMENT, 2.
- Dismissal, presumptions as to regularity of order, see JUDGMENT, 4.
- Evidence establishing character of property, see HUSBAND AND WIFE, 1.
- Evidence, defect in street, see MUNICIPAL CORPORATIONS, 17.
- Evidence of diligence in use of boom site, see LOGS AND LOGGING, 3.
- Evidence to reform deed, see REFORMATION OF INSTRUMENTS, 1.
- Review of evidence for personal injuries, see MASTER AND SERVANT, 13.

APPEAL AND ERROR—CONTINUED.

- Expulsion of member from mutual benefit society, see **BENEFICIAL ASSOCIATIONS**, 1, 2.
- Foreclosure suits, see **MORTGAGES**, 1-4; **MECHANICS' LIENS** 3, 4; **TAXATION**, 8.
- Judgment unappealed from, see **CONTEMPT**, 1.
- Modification of contract, see **CONTRACTS**, 7.
- Review of verdict, see **MASTER AND SERVANT**, 3.
- Verdict as to fraudulent release of claim for personal injuries, see **RELEASE**, 1.
- Vacating default, see **JUDGMENT**, 10.
42. **APPEAL — DISMISSAL — MOTION DENIED — NO RECONSIDERATION AT HEARING ON MERITS.** After passing upon a motion to dismiss an appeal, the supreme court will not again consider the motion at the trial on the merits. *Ellis v. Moon*..... 114
43. **APPEAL—DISMISSAL FOR FAILURE TO PROSECUTE—BAR.** After the dismissal of an appeal from an erroneous judgment, for failure to prosecute it, the error cannot be reviewed by an appeal from an order refusing to vacate the judgment. *Ellis v. Moon*..... 114
44. **APPEAL—REVIEW—THEORY OF TRIAL—SAME AS IN LOWER COURT—TORT OR CONTRACT.** When counsel state in the court below that the action is upon contract, it will be tried upon that theory on appeal. *Nielsen v. Northeastern Siberian Co.*..... 194
45. **APPEAL—REVIEW—QUESTIONS DETERMINED.** In an action for negligence in the maintenance of railroad tracks, where the evidence as to the nature of the defect is not brought up on appeal, the supreme court cannot determine the applicability of Laws 1899, p. 49, requiring railroads to adopt certain precautionary measures in the care of its tracks. *Collier v. Great Northern R. Co.*..... 639
46. **SAME—ERROR ON REFUSING NEW TRIAL—OBJECTIONS CONTROLLED BY CONCEDED FINDINGS.** Where the exceptions to findings are insufficient, a ruling upon a motion for a new trial for insufficiency of the evidence must be controlled by the findings of fact. *Smith v. Glenn*..... 262
47. **APPEAL—REVIEW—JUDGMENT OF CONTEMPT—DISCRETION.** Contempt proceedings are summary, and so far as questions of law are concerned, the extent of the hearing is within the discretion of the court, which will not be reviewed when the conclusion arrived at is correct. *State v. Nicoll*..... 517
48. **APPEAL—REVIEW—DIVORCE.** The findings in a divorce suit will not be disturbed on appeal if justified by the evidence. *Wainwright v. Wainwright*..... 117
49. **APPEAL—REVIEW—VERDICT.** The verdict of a jury upon conflicting evidence which is sufficient to support the judgment will not be disturbed on appeal. *Irby v. Phillips*..... 618

APPEAL AND ERROR—CONTINUED.

50. APPEAL—REVIEW—EXCLUSION OF EVIDENCE—HARMLESS ERROR. In a case tried before the court without a jury, it is harmless to exclude evidence to impeach a witness, where the court states that it attaches no weight to the evidence of such witness. *Bringgold v. Bringgold*..... 121
51. APPEAL AND ERROR—REVIEW—HARMLESS ERROR. Errors in ruling on the findings are harmless in actions triable *de novo* on appeal. *Reynolds v. Great Northern R. Co.*..... 163
52. SAME—EVIDENCE—HARMLESS ERROR NOT AFFECTING CONCEDED FINDINGS. Upon a trial before the court without a jury it is harmless error to exclude testimony which was not susceptible of influencing the findings. *Smith v. Glenn*..... 262
53. APPEAL—REVIEW—HARMLESS ERROR. Error in refusing to strike out evidence of other acts of negligence on the part of a coservant alleged to be incompetent, is harmless where the court fully and fairly instructed the jury as to what questions of negligence they might consider, and the question of the incompetence of such co-servant was not one of them. *Dossett v. St. Paul etc. Lum. Co.*.. 276
54. APPEAL—REVIEW—ERROR CURED BY VERDICT. In an action for personal injuries, error in refusing to give instructions as to the burden of proving plaintiff's contributory negligence is harmless, where the jury by special verdict find that the defendant was not guilty of negligence. *Denny v. Kleebe*..... 634
55. APPEAL—REVIEW—HARMLESS ERROR AS TO EVIDENCE. In an action for personal injuries, cross-examination of the attending physician showing that the defendant paid for his services, although on his examination in chief the witness gave no testimony as to his charges, is not error prejudicial to the plaintiff, where by a special verdict the jury found the defendant not guilty of any negligence. *Denny v. Kleebe*.....:..... 634
56. APPEAL—REVIEW—ESTOPPEL—CONSENT TO PROCEEDINGS. The appellant cannot allege error in the court's availing itself of a private examination of witnesses, after having consented to such proceeding. *Dawson v. Dawson*..... 656
57. APPEAL—DECISION—LAW OF CASE. Questions decided upon a former appeal become the law of the case upon a second appeal. *Jancko v. West Coast Mfg. etc. Co.*..... 230
58. INSTRUCTIONS—EXCEPTIONS BY RESPONDENT—LAW OF CASE. Where instructions are not excepted to by respondents, they are binding upon them as the law of the case. *Dyer v. Middle Kittitas Irr. Dist.*..... 238
59. APPEAL—DECISION—LAW OF CASE ON SECOND APPEAL. In an action for damages for breach of a contract to employ plaintiff as long as certain work in Manila should last, a decision of the supreme court upon a former appeal on demurrer to the complaint, that it was not

APPEAL AND ERROR—CONTINUED.

Expulsion of member from mutual benefit society, see BENEFICIAL ASSOCIATIONS, 1, 2.

Foreclosure suits, see MORTGAGES, 1-4; MECHANICS' LIENS 3, 4; TAXATION, 8.

Judgment unappealed from, see CONTEMPT, 1.

Modification of contract, see CONTRACTS, 7.

Review of verdict, see MASTER AND SERVANT, 3.

Verdict as to fraudulent release of claim for personal injuries, see RELEASE, 1.

Vacating default, see JUDGMENT, 10.

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APPEAL AND ERROR—CONTINUED.

void for uncertainty as to its duration, nor was it for an indefinite period in the sense that either could terminate it at will, and holding that it was not so indefinite that either party was at liberty to terminate it, became the law of the case, and such contract must be held to be valid for a definite term, viz., as long as the work at Manila would last (MOUNT, C. J., and HADLEY, J., dissenting). *Prescott v. Puget Sound Bridge etc. Co.*..... 354

60. APPEAL—NOTICE—SECOND APPEAL. The pendency of an appeal, ineffectual because of the failure to file a bond, is not a bar to a second appeal in the same cause. *Tatum v. Geist*..... 575

XI. DETERMINATION AND DISPOSITION OF CAUSE.

Costs, see COSTS, 1-3; APPEAL AND ERROR, 38, 39.

Disposition of abandoned appeal, see APPEAL AND ERROR, 38.

Giving respondent benefit of error, see APPEAL AND ERROR, 37.

61. APPEAL—FROM CONFIRMATION OF ASSESSMENT ROLL—REVERSAL AS TO APPELLANTS—FRUITS OF APPEAL. Under Laws 1893, p. 200, § 30, the judgment on appeal from a local assessment can affect only the property of the appellants, and those who did not join in the appeal can derive no benefits therefrom. *In re Westlake Avenue*..... 144

62. SAME—DECISION—REMAND—COSTS. Where, on appeal from an assessment by part of the owners, the cause is reversed and a new assessment ordered as to the appellants' property and other property not assessed, the costs of the appeal should be taxed against the city, and the costs of the former and the new assessment should be charged against the property to be reassessed. *In re Westlake Avenue*..... 144

APPEARANCE:

1. APPEARANCE—GENERAL—BY MOTION TO VACATE VOID JUDGMENT—EFFECT—JURISDICTION—WAIVER. A general appearance in support of a motion to set aside a void judgment, does not validate the judgment or waive the question of jurisdiction. *Bennett v. Supreme Tent etc. Maccabees*..... 431

APPLICATION:

For insurance, see INSURANCE, 1.

APPORTIONMENT:

Of assessments for public improvements, see MUNICIPAL CORPORATIONS, 10, 13, 14.

APPROPRIATION:

Of boom location, see LOGS AND LOGGING.

APPURTENANCES:

Of vessel, see SHIPPING, 1.

ARCHITECTS:

Construction of contract, see **CONTRACTS**, 6.

ARREST:

See **BAIL**.

In extradition proceedings, see **EXTRADITION**, 1.

ASSAULT WITH INTENT TO MURDER:

See **CRIMINAL LAW**, 1, 2.

ASSESSMENTS:

Local improvement, review, fruits of appeal, costs, see **APPEAL AND ERROR**, 61, 62.

Compelling assessment to pay ditch warrants, see **COUNTIES**, 1-5.

Street improvement fund, wrongful diversion, see **MUNICIPAL CORPORATIONS**, 8, 9.

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 10-16.

ASSETS:

Distribution upon dissolution of partnership, see **PARTNERSHIP**, 4.

ASSIGNMENT OF ERRORS:

See **APPEAL AND ERROR**, 11, 35.

ASSIGNMENTS:

Cause of action against private banker for deposits, see **BANKS AND BANKING**, 1.

1. **ASSIGNMENTS—CONTRACTS ASSIGNABLE.** A contract for medical treatment is personal and non-assignable. *Deaton v. Lawson*... 486

ASSOCIATIONS:

See **BENEFICIAL ASSOCIATIONS**; **BUILDING AND LOAN ASSOCIATIONS**.

ASSUMPTION:

Of risk by employee, see **MASTER AND SERVANT**, 8, 11.

ATTACHMENT:

1. **ATTACHMENT — DEBT NOT DUE — PLEADINGS — COMPLAINT — DEMURRER — FAILURE TO ALLEGE FRAUDULENT DISPOSITION OF PROPERTY.** Upon attachment for a debt not due, permitted by Bal. Code, § 5352, in certain cases, the complaint is demurrable, where it fails to allege a fraudulent disposition of the defendant's property, as required by said statute, and it is not aided by the statements of the affidavit for attachment. *Carstens v. Milo*..... 335
2. **SAME—QUASHING WRIT—RIGHT TO AMEND COMPLAINT—FAILURE TO OFFER AMENDMENT.** The dismissal of an action, upon sustaining a demurrer to the complaint and quashing a writ of attachment for defects in the complaint, cannot be urged as error where plaintiffs made no application to amend the defects, as authorized by Bal. Code, § 5380. *Carstens v. Milo*..... 335

ATTORNEY AND CLIENT:

Advising violation of order, see **CONTEMPT**, 4.

Argument and conduct of counsel at trial, see **TRIAL**, 2.

Transactions between, fraud, rescission, see **SALES**, 4-6.

Fraud in conducting case, see **JUDGMENT**, 12.

Neglect of attorney as ground for new trial, see **JUDGMENT**, 6.

Neglect of attorney as ground for vacation or new trial, see **NEW TRIAL**, 2.

Fees, see **APPEAL AND ERROR**, 38, 39; **COSTS**, 1, 2; **MECHANICS' LIENS**, 2-4.

1. **ATTORNEY AND CLIENT—TRANSACTIONS BETWEEN—GOOD FAITH.** Where a sale of mining stock from an attorney to an inexperienced woman grew out of transactions in which he represented her as an attorney and in a confidential relation, whereby he gained her confidence, he is bound to use the utmost good faith, the burden of proving which will be upon him; and the sale should be rescinded if material matters were misrepresented. *Landis v. Wintermute*..... 673

AUTHORITY:

Of agent, see **PRINCIPAL AND AGENT**, 1.

Of partner to execute contract, see **PARTNERSHIP**, 1.

To grant franchise for laying water mains in highway, see **COUNTIES**, 8.

BAIL:

Forfeiture, see **APPEAL AND ERROR**, 20.

1. **BAIL—UPON UNLAWFUL ARREST—CASH DEPOSIT—FORFEITURE—TITLE.** Where a party is arrested without authority of law, or any legal charge made against him, and is entitled to his discharge as a matter of right, a cash deposit in lieu of bail is an involuntary act and without consideration, and the magistrate having obtained possession of the money unlawfully, neither he nor the public authorities can retain it as against the party making the deposit. *State ex rel. Grass v. White*..... 560

BANKRUPTCY:

1. **BANKRUPTCY—FRAUDULENTLY INSTITUTED BY VENDEE OF BANKRUPT—DEMAND FOR GOODS—DELAY.** Where a fraudulent vendee of a debtor, after losing the goods to the creditors, fraudulently instituted an involuntary bankruptcy proceeding against the debtor, in which the creditors do not appear, and the trustee delays for more than a year to make any demand for the value of the goods, nor until it is too late for the creditors to file their claims, the trustee is estopped to prosecute any action for the recovery of the value of the goods. *Olwell v. Gordon & Co*..... 185

BANKS AND BANKING:

False representations to secure credit, see FRAUD, 1.

1. **BANKS AND BANKING—LIABILITY OF PRIVATE BANKER TO DEPOSITORS—COMPLAINT—SUFFICIENCY—DEFENSES—TRANSFER OF INTEREST IN BANK.** A private banker is personally liable to repay depositors, on demand, the amount of their deposits at the time of his transfer of the bank, or the amount they might thereafter deposit in ignorance of the transfer, if without negligence in failing to discover the transfer, and this right of action is assignable. *Johnson v. Shuey*..... 22
2. **SAME—DEFENSES—PRESENTATION OF CLAIMS TO RECEIVER AND ACCEPTANCE OF DIVIDENDS—ORIGINAL DEBTOR NOT DISCHARGED BY UNSUCCESSFUL EFFORTS TO RECOVER.** A depositor's right of action against a private banker is not discharged by the filing of a claim and acceptance of a dividend from a receiver of the banker's assignee to whom the bank had been sold, and who had agreed to repay the deposits; since the promise to pay the deposits may be sued on by the depositors in their own names, and merely makes the original debtor a surety, and both debtors may be pursued, severally or jointly. *Johnson v. Shuey*..... 22

BAR:

See ESTOPPEL.

Of action by former adjudication, see JUDGMENT, 13.

Action against one of two severally liable as bar to sue other, see ELECTION OF REMEDIES, 1.

Of action by limitation, see LIMITATION OF ACTIONS.

Of second appeal by pendency of former ineffectual appeal, see APPEAL AND ERROR, 60.

To prosecution by dismissal for lesser offense, see CRIMINAL LAW, 1, 2.

Of review by dismissal of appeal, see APPEAL AND ERROR, 43.

Of sale by expiration of judgment lien, see JUDGMENT, 1, 2.

Of will contest for failure to file amended petition, see WILLS, 1.

BENEFICIAL ASSOCIATIONS:

Building and loan associations, see BUILDING AND LOAN ASSOCIATIONS.

Foreign, service of process upon, see PROCESS, 1-4.

1. **INSURANCE—BENEFICIAL ASSOCIATIONS—EXPULSION OF MEMBER—JURISDICTION OF COURTS TO REVIEW.** The expulsion of a member from a mutual benefit association will not be reversed by the courts except to ascertain whether the proceedings were regular, in good faith, and not in violation of the laws of the land. *Kelly v. Grand Circle Women of Woodcraft*..... 691
2. **SAME—REGULARITY OF PROCEEDINGS—CHARGES—SUFFICIENCY.** Charges of a general nature, preferred against a member of a mutual benefit association, accusing the member of threats to wrong-

BENEFICIAL ASSOCIATIONS—CONTINUED.

fully use the funds, and slandering other members and officers, are sufficient to sustain an order of expulsion from the association, where the member did not point out wherein they should be made more specific. *Kelly v. Grand Circle Women of Woodcraft*..... 691

BENEFITS:

Of appeal from special assessment, see **APPEAL AND ERROR**, 61.

Of invalid contracts, receipt as ratification or estoppel, see **MUNICIPAL CORPORATIONS**, 4-7.

Of public improvement, see **MUNICIPAL CORPORATIONS**, 12, 13.

BILLS AND NOTES:

See **COMPROMISE AND SETTLEMENT**, 1.

1. **BILLS AND NOTES—ACTIONS—DEFENSES—USURY—BURDEN OF PROOF.** In an action by the indorsee of promissory notes, shown to be usurious and void in the hands of the original payee, the burden of proof is upon the holder to show that he acquired the notes before maturity, for value and in good faith, without notice of the usury. *Keene v. Behan*..... 505
2. **SAME—SUFFICIENCY.** The claim that an indorsee acquired usurious notes before maturity, without notice of the usury, is not sustained where his testimony is uncorroborated, and it appears that he acquired the same at a heavy discount under suspicious circumstances, after one of the series was overdue, which he claimed not to have purchased, and after all had been declared due, that he demanded payment of all of them before his first one matured, that the former holder demanded payment after the date on which the indorsee claims to have bought them, and where he failed to state the circumstances under which he bought. *Keene v. Behan*..... 505
3. **SAME—EVIDENCE OF GOOD FAITH—NECESSITY.** Under Laws 1899, p. 350, § 52, the burden of proof is upon the holder of a usurious note, to show affirmatively the facts constituting good faith upon his part, and that he had no notice of the defect, and it is not sufficient for him to prove that he acquired the notes before maturity for value. *Keene v. Behan*..... 505
4. **SAME—CONSIDERATION—TITLE OF PAYEE—WHEN DEFECTIVE.** Under Laws 1899, p. 350, § 55, the title of a person who negotiates a promissory note is defective where the only consideration therefor was unlawful usury exacted on a former note between the same parties. *Keene v. Behan*..... 505

BOATS:

Appurtenances, see **SHIPPING**, 1.

BONA FIDE PURCHASER:

See **DEEDS**, 2.

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 1-3.

BONDS:

See BAIL.

On appeal, construction, sufficiency, see APPEAL AND ERROR, 20-22, 41;
mandamus to fix, see MANDAMUS, 1.

Of husband, liability of community realty, see HUSBAND AND WIFE, 3.

Indemnity bonds, see INDEMNITY.

Investment of school fund in, see SCHOOLS AND SCHOOL DISTRICTS, 2.

Of municipality, sale, broker's commissions, see MUNICIPAL CORPORATIONS, 4-7.

BOOMS:

'Construction, anticipation of future needs, see LOGS AND LOGGING,
1-4.

BOUNDARIES:

Of new school district, see SCHOOLS AND SCHOOL DISTRICTS, 5.

Reforming deed as to boundary line, see REFORMATION OF INSTRUMENTS, 1.

BREACH:

Of conditions, see INSURANCE, 1.

Of contract, see CONTRACTS, 8; INDEMNITY, 1-4; SALES; VENDOR AND PURCHASER, 1.

Of warranty, see SALES, 1-3.

BRIEFS:

On appeal, see APPEAL AND ERROR, 35, 36; CRIMINAL LAW, 30.

BUILDING AND LOAN ASSOCIATIONS:

Cancellation of fraudulent certificates, see APPEAL AND ERROR, 4, 21.

1. CORPORATIONS—FOREIGN BUILDING AND LOAN ASSOCIATION—FAILURE TO COMPLY WITH STATUTE—EFFECT ON CONTRACTS. Contracts made by a foreign building and loan association without complying with certain statutory requirements whereby it is authorized to transact business in this state, are not void, where the law prescribes a penalty for so doing without declaring that the contracts made shall be void. *Horrell v. California etc. Homebuilders' Ass'n*..... 531

BUILDING CONTRACTS:

See CONTRACTS; INDEMNITY, 1-4.

BUILDINGS:

Liens, see MECHANICS' LIENS.

BULK STOCK LAWS:

Sale of stock in bulk, see FRAUDULENT CONVEYANCES, 1-3.

BURDEN OF PROOF:

See WILLS, 5.

In criminal prosecutions, see CRIMINAL LAW, 7.

Good faith in sale by attorney to client, see ATTORNEY AND CLIENT, 1.

On issue of good faith of holder of usurious note, see BILLS AND NOTES, 1, 3.

For reformation of deed, see REFORMATION OF INSTRUMENTS, 1.

CANCELLATION OF INSTRUMENTS:

See APPEAL AND ERROR, 4, 21; VENDOR AND PURCHASER, 2-4.

CARRIERS:

Enforcement of contract to furnish power to, see SPECIFIC PERFORMANCE, 1, 2.

Injury to passenger alighting from street car, see PLEADING, 5.

1. CARRIERS—NEGLIGENCE—INJURY TO PASSENGER ON STREET CAR—BLOW-OUT OR EXPLOSION—PRESUMPTION—DOCTRINE OF RES IPSA LOQUITUR. Where an accident to a passenger on a street car is due to an explosion or blow-out of the controller, a presumption of negligence on the part of the carrier arises, since the doctrine of *res ipsa loquitur* applies where the accident is due to equipment or operation over which the carrier had entire control. *Firebaugh v. Seattle Electric Co.*..... 658
2. SAME—ACT OF PASSENGER IN IMMINENT PERIL—JUMPING FROM CAR—APPLICATION OF DOCTRINE. The fact that the plaintiff, in imminent peril, without negligence on his part, undertook to escape from a burning or exploding controller by jumping from a street car, and was injured by the fall, does not affect the presumption that the accident was due to the negligence of the carrier. *Firebaugh v. Seattle Electric Co.*..... 658
3. SAME—CAUSE OF ACCIDENT UNKNOWN—PRESUMPTION. Proof on the part of the defendant, a street railway company, to the effect that the witnesses did not know what caused the controller to blow out or explode, which sometimes happened without any known cause, will not, as a matter of law, rebut the presumption of negligence arising therefrom in favor of a passenger; especially where there was testimony showing different possible causes that might have been controlled and remedied; and the question is one for the jury. *Firebaugh v. Seattle Electric Co.*..... 658
4. CARRIERS—LIVESTOCK—INTERSTATE SHIPMENT—CONTRACT—EXEMPTING FROM STATUTORY LIABILITY—VALIDITY. A provision in a contract for the carriage of livestock, exempting the carrier from liability for loss sustained through the violation of a statutory duty, is void. *Reynolds v. Great Northern R. Co.*..... 163
5. CARRIERS—LIVESTOCK—CONTRACT REQUIRING SHIPPER TO UNLOAD FOR REST—CONSTRUCTION—VIOLATION OF STATUTORY DUTY. A provision in a contract for the carriage of livestock requiring the shipper

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to load and unload the stock at his own expense at any place where the same may be unloaded, does not release the carrier from liability for damages by reason of its breach of duty to unload for rest, food and water, as required by the Federal statute. *Reynolds v. Great Northern R. Co.*..... 163

6. **CARRIERS—LIVESTOCK—DELIVERY—DUTY TO PROVIDE SUITABLE INCLOSURES.** A carrier owes the duty to deliver stock to the consignee in or through inclosed lots or yards, and is liable for loss due to the scattering of stock unloaded without the usual and proper facilities. *Reynolds v. Great Northern R. Co.*..... 163
7. **SAME—KNOWLEDGE OF SHIPPER—CONTRACT—CONSTRUCTION.** Where the shipper did not know that there were no proper facilities for unloading stock at the destination, the contract must be construed with reference to unloading where there were usual facilities. *Reynolds v. Great Northern R. Co.*..... 163
8. **SAME—PRESENTING CLAIM FOR DAMAGES—WHEN IN TIME—PROVISIONS OF SHIPPING CONTRACT.** A claim for a loss on the shipment of livestock, required by the shipping contract to be made within ten days, is in due time, where, upon stating the claim within two days after the loss, the plaintiff was referred to other agents, who finally requested that he write a letter, which he did without delay, stating the claim as fully as it was then known, all within two weeks of the loss. *Reynolds v. Great Northern R. Co.*..... 163
9. **SAME.** A statement in such claim that thirty-five head of cattle (which were turned loose and strayed at the place of destination) are still lost, for which he had offered \$2 per head, is sufficient on which to base a claim for depreciation in value by reason of the straying of the lost cattle. *Reynolds v. Great Northern R. Co.*..... 163
10. **CARRIERS — LIVESTOCK — DUTY TO UNLOAD FOR REST, FOOD AND WATER—CONFINEMENT FOR 28 CONSECUTIVE HOURS—VIOLATION OF FEDERAL STATUTE—NEGLIGENCE PER SE—PLEADING—COMPLAINT—SUFFICIENCY.** The confinement, by a common carrier, of livestock for more than twenty-eight consecutive hours without unloading for rest, food or water, in violation of the Federal statute, where the shipment is from one state to another, is negligence *per se*, and a complaint for damages therefor need only allege the violation of the statute and the resulting injury. *Reynolds v. Great Northern R. Co.*..... 163

CATTLE STEALING:

See **CRIMINAL LAW**, 11-13.

CAUSE OF ACTION:

See **ACTION**.

Assignability, see **BANKS AND BANKING**, 1.

CAVEAT EMPTOR:

See SALES, 1.

CERTAINTY:

Of contract, see CONTRACTS, 1.

Complaint, see TAXATION, 9.

CERTIFICATE:

Of magistrate as part of proofs of loss, see INSURANCE, 2.

Of work in lieu of road tax, see HIGHWAYS, 1, 2.

CERTIFICATION:

Of conviction of minor in justice's court to superior court for sentence, see CRIMINAL LAW, 23, 24.

CERTIORARI:

Costs, see COSTS, 1, 2.

Review on appeal, see CRIMINAL LAW, 31.

1. CERTIORARI—TO REVIEW ESTABLISHMENT OF SCHOOL DISTRICT—COUNTY COMMISSIONERS' DECISION ON APPEAL FROM SUPERINTENDENT—FINALITY. Certiorari does not lie to review the action of the county commissioners on appeal from the establishment of a new school district by the superintendent of schools, where there was neither want of jurisdiction or action in excess of jurisdiction, 3 Bal. Code, § 2275 (Laws 1899, p. 19) providing that its action on void appeal shall be final. *Wilsey v. Cornwall*..... 250

CHANGE OF VENUE:

Of civil actions, see VENUE, 1.

Of criminal prosecutions, see CRIMINAL LAW, 32, 33.

CHATTEL MORTGAGES:

See TROVER AND CONVERSION, 1

CITIES:

See MUNICIPAL CORPORATIONS.

CLAIMS:

For injuries from defective sidewalk, see MUNICIPAL CORPORATIONS, 20-23.

Invalid claim against city, ratification, see MUNICIPAL CORPORATIONS, 4.

COLLATERAL ATTACK:

Estoppel, see TAXATION, 5.

On judgment, see JUDGMENT, 4.

On official government surveys, see PUBLIC LANDS, 3.

COMMISSIONERS:

- County commissioner, see COUNTIES.
- Apportionment of local improvement tax, see CONSTITUTIONAL LAW, 1; MUNICIPAL CORPORATIONS, 12-14.
- Of insurance as statutory agent for service of process, see PROCESS, 1-4.
- Of public lands, investment of school fund, see SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

COMMISSION MERCHANTS:

- See FACTORS.

COMMUNITY PROPERTY:

- See HUSBAND AND WIFE, 1, 3.
- Estoppel of wife by acts of husband, see ESTOPPEL, 2.

COMPETENCY:

- Of evidence in civil actions, see EVIDENCE, 1, 2,
- Of evidence in criminal prosecutions, see CRIMINAL LAW, 9-21.

COMPLAINT:

- In civil actions, see PLEADING.
- In criminal prosecutions, see CRIMINAL LAW, 1-4, 18.

COMPROMISE AND SETTLEMENT:

- Of claim for personal injuries, see RELEASE, 1.
- 1. COMPROMISE AND SETTLEMENT—LAND HELD AS SECURITY FOR ADVANCES—INTEREST ON ADVANCES—RATE FIXED BY NOTE ON EXTENDING TIME. Where property was purchased for another and the title held until payment of the purchase price, a settlement between the parties fixing the balance due, for which a note was given, constitutes such sum a claim upon the land, drawing interest at the rate specified in the note, and not at the legal rate; and a third party, to whom the equitable owners had assigned their interest, is not entitled to a conveyance upon payment of such sum with interest at only the legal rate. *Johnson v. Pullman State Bank*..... 64

CONCLUSIVENESS:

- Of confirmation of judicial sale, see MORTGAGES, 2.
- Of conviction on plea of guilty, see HABEAS CORPUS, 1.
- Of decree of divorce, see DIVORCE, 2.
- Of decision on appeal, see INJUNCTION, 1.
- Of determination of board of land commissioners as to investment of school fund, see SCHOOLS AND SCHOOL DISTRICTS, 1.
- Of ruling on motion for new trial, see NEW TRIAL, 2.
- Of tax foreclosure judgment, see TAXATION, 5.
- Of verdict on origin of fire, see RAILROADS, 3.

CONDEMNATION:

Appeal, abandonment, costs, see **APPEAL AND ERROR**, 38, 39.
Of lands for boomage purposes, see **LOGS AND LOGGING**, 1-5.

CONDITIONAL SALES:

See **TROVER AND CONVERSION**, 1.

CONDITIONS:

In contracts, see **CONTRACTS**, 3.
In insurance policies, see **INSURANCE**, 1.
Conditional delivery of stock certificate, see **ESCROWS**, 1.

CONFIRMATION:

Of foreclosure sale, see **MORTGAGES**, 2-4.

CONGRESS:

Grants of tide lands in aid of railroads, see **PUBLIC LANDS**, 1-4.

CONSENT:

Of executor to vacation of divorce, see **DIVORCE**, 3, 4.

CONSIDERATION:

Failure, see **VENDOR AND PURCHASER**, 1.
Of bill of exchange or promissory note, see **BILLS AND NOTES**, 4.
Of contract to be fixed by third party, see **CONTRACTS**, 1.

CONSIGNMENT:

See **FACTORS**.

CONSTITUTIONAL LAW:

See **CONTEMPT**, 5; **CRIMINAL LAW**, 2, 6, 7; **MECHANICS' LIENS**, 2;
MUNICIPAL CORPORATIONS, 24, 25; **WATERS**, 2, 3.

Amendment of statutes, see **STATUTES**, 1, 2.

Constitutional disclaimer of title to patented tide lands, see **PUBLIC LANDS**, 2, 4.

Investment of school fund in municipal bonds, see **SCHOOLS AND SCHOOL DISTRICTS**, 2.

1. **CONSTITUTIONAL LAW—ENCROACHMENT ON JUDICIARY—LEGISLATIVE FUNCTIONS — MUNICIPAL CORPORATIONS — LOCAL IMPROVEMENTS — SPECIAL ASSESSMENT—COMMISSIONERS APPOINTED BY COURT.** The act authorizing a city to initiate special assessments for local improvements which provides that the apportionment of the tax shall be made by commissioners appointed by the superior court subject to revision by the court, merely invokes the assistance of the court to correct errors and inequalities, the commissioners being agents of the city, and does not confer legislative powers on the court and is not obnoxious to Const., art. 7, § 9, providing that the legislature may vest in the corporate authorities of cities power to levy special assessments for local improvements. *In re Westlake Avenue*..... 144

CONSTRUCTIVE NOTICE:

Of deed records, see DEEDS, 1, 2.

Of wrongful diversion of special fund, see LIMITATION OF ACTIONS, 1.

CONTEMPT:

Of city officers, see MUNICIPAL CORPORATIONS, 2, 3.

Violation of injunction, see INJUNCTION, 1.

Review, see APPEAL AND ERROR, 47.

1. **CONTEMPT—AFFIDAVIT—SUFFICIENCY—VALIDITY OF JUDGMENT UN-
APPEALED FROM.** Upon a contempt proceeding for violating an order
as to the obstruction of a highway, the question as to whether the
judgment was void because no highway existed cannot be considered
when the judgment was not appealed from. *State ex rel. Dye v.
Reilly*..... 217
2. **CONTEMPT—VIOLATION OF ORDER—AFFIDAVIT—SUFFICIENCY.** An
affidavit in contempt proceedings which states that the appellant
was restrained by the court from obstructing a highway, and that
he afterwards obstructed the same, states sufficient facts to author-
ize a conviction for contempt. *State ex rel. Dye v. Reilly*..... 217
3. **CONTEMPT—PARTIES PLAINTIFF—MISJOINDER.** There is no mis-
joinder of parties plaintiff, in a proceeding for contempt instituted
by the state on relation of the prosecuting attorney, in failing to
join the road supervisor or county commissioners, in a prosecution
for contempt in obstructing a county road, in violation of an order
of court. *State ex rel. Dye v. Reilly*..... 217
4. **CONTEMPT—VIOLATION OF ORDER—PARTIES—JOINDER—SUFFICIENCY
OF AFFIDAVIT.** Where an affidavit in contempt proceedings against
the mayor and council of a city alleges the violation by such officers
of an order of court, after advising with the city attorney and upon
the hearing the city attorney admits that he advised the violation of
the order, the court has jurisdiction to order the city attorney made
a party defendant, and to proceed against him as an original party
to the proceedings without the filing of a new affidavit, although the
statute provides that contempts not committed in the presence of the
court can be prosecuted only upon affidavit stating the facts (Crow
and FULLERTON, JJ., dissenting). *State v. Nicoll*..... 517
5. **WITNESSES—PRIVILEGE—GIVING EVIDENCE AGAINST ONESELF—CON-
TEMPT—CIVIL NATURE.** A contempt proceeding is not a criminal case,
within the meaning of Const., art. 1, § 9, which provides that no
person shall be compelled to give evidence against himself. *State
ex rel. Dye v. Reilly*..... 217
6. **SAME—PUNISHMENT WHEN LIMITED TO FINE OF \$100.** A contempt
for violating an order against the obstruction of a county road can-
not be punished otherwise than by a fine not exceeding \$100, under
Bal. Code, § 5799. *Id.*..... 217

CONTEST:

Of will, petition, time for filing, see **WILLS**, 1-6.

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Failure to request, see **NEW TRIAL**, 3.

CONTRACTORS:

Bonds, see **INDEMNITY**, 1-4.

Liens, see **MECHANICS' LIENS**.

CONTRACTS:

Action in contract or tort, see **ACTIONS**, 1.

Assignment, see **ASSIGNMENTS**, 1.

Construction, see **APPEAL AND ERROR**, 59.

Specific performance, see **SPECIFIC PERFORMANCE**, 1, 2.

Contracts of particular classes of parties: See **MUNICIPAL CORPORATIONS**. Authority of partner to execute, see **PARTNERSHIP**, 1. Of foreign corporations not complying with local statutes, see **BUILDING AND LOAN ASSOCIATIONS**, 1. Independent contractor, see **MASTER AND SERVANT**, 15, 16. Modification by agent, see **PRINCIPAL AND AGENT**, 1.

Contracts relating to particular subjects: Ground for mechanics' liens, see **MECHANICS' LIENS**, 1. For redemption, see **MORTGAGES**, 5. Releasing claim for personal injuries, see **RELEASE**, 1. To render medical services, validity, see **PHYSICIANS AND SURGEONS**, 1. Shipment of livestock, exempting carrier from violation of statutory duty, see **CARRIERS**, 4, 5, 7, 8. To locate mining claims, see **ACCOUNT**, 2.

Particular classes of contracts: See **SALES**; **INDEMNITY**; **INSURANCE**. Sales of realty, see **VENDOR AND PURCHASER**. Trust, construction, see **TRUSTS**, 1.

1. **CONTRACTS—TO CUT LOGS ON LANDS OF ANOTHER—CERTAINTY—PRICE FIXED BY THIRD PARTY.** A contract for the cutting of timber on the land of another is not incomplete because the price was left to be fixed by a third person. *Tacoma Mill Co. v. Perry*..... 44
2. **CONTRACTS—ASSENT—CONSTRUCTION—EXTRAS.** Where a written offer to furnish mill material for a building at a certain sum, extras to be paid for at a reasonable price, was accepted upon condition that there should be no charge for extras, and thereafter the contract is acted upon without further communication, the contractor must be held to have assented, and cannot recover for extras. *Littell v. Saulsberry*..... 550
3. **CONTRACTS — CONSTRUCTION — SALE OF BUSINESS — CONDITION FOR BENEFIT OF VENDEES THAT A LEASE BE SECURED—WAIVER BY VENDEES—REFUSAL OF VENDORS TO PERFORM—MEETING OF MINDS OF PARTIES.** A condition in an agreement for the sale of a butchering business, providing that the vendees shall have until a certain date to secure a

CONTRACTS—CONTINUED.

- lease of the premises, which they undertake to do, and that the contract shall be at an end and the purchase money returned if a lease cannot be secured, is for the sole benefit of the vendees and may be waived by them, making the sale absolute and binding on the vendors. *Kubillus v. Ewert*..... 38
4. CONTRACTS — PARTLY WRITTEN AND PARTLY ORAL — NEGOTIATIONS CULMINATING IN WRITTEN AGREEMENT. Oral statements of solicitors of the defendant are not part of a written contract of employment signed by the defendant's president and manager, whereby plaintiff agreed to prospect in Siberia for more than one year; since the written contract is presumed to embody the terms of the agreement, and the solicitors had no power to bind the company by an oral agreement, not to be performed within one year. *Nielsen v. Northeastern Siberian Co.*..... 194
5. CONTRACTS—CONSTRUCTION. The construction of a written contract which is unambiguous, is a question for the court, without submission to a jury. *Larson v. American Bridge Co.*..... 224
6. CONTRACTS—ESTIMATE OF ENGINEER—ENGINEER'S CONSTRUCTION OF TERMS—CONCLUSIVENESS—MISTAKE. A contract for the construction of an irrigating canal providing that the estimates made by the engineer shall be conclusive unless impeached for fraud, and that his decision defining the meaning and intent of the plans and specifications shall be final, refers to doubtful terms in the plans and specifications and does not give the architect power to define the plain terms of the contract; and an allowance by him for material strung along the line of the canal, which the contract required to be "delivered and in place," will be held to be a "mistake," which the courts will correct by deducting the sum allowed therefor in the engineer's estimate. *Dyer v. Middle Kittitas Irr. Dist.*..... 238
7. CONTRACTS—MODIFICATION BY PAROL. It is error to submit to the jury an issue as to whether a contract for the construction of an irrigating canal was modified by an oral agreement whereby the contractor agreed to carry on the work at his own expense, where the evidence, while showing that both parties believed that bonds would be ultimately issued, did not tend to prove a modification of the contract. *Dyer v. Middle Kittitas Irr. Dist.*..... 238
8. CONTRACTS—TO PROSPECT IN SIBERIA—TRANSPORTATION—DESTINATION OR PORT OF DELIVERY—EXPULSION FROM SHIP—BREACH OF CONTRACT—FINDINGS—EVIDENCE—SUFFICIENCY. Where the plaintiff engaged to prospect for the defendant in Siberia, and was transported to the Siberian coast in one of the defendant's vessels, without specification as to the port where he should be landed, except that it was to be on the Siberian coast, it is not a breach of the contract that he was forcibly ejected at a point where the defendant had a station. *Nielsen v. Northeastern Siberian Co.*..... 194

CONTRACTS—CONTINUED.

9. **CONTRACTS—INVALIDITY—RECOVERY OF MONEY PAID.** Money paid on an executory contract for medical treatment, to a person having no license to practice, and void as against public policy, may be recovered. *Deaton v. Lawson*..... 486

CONTRIBUTORY NEGLIGENCE:

See **APPEAL AND ERROR**, 54.

Of servant, see **MASTER AND SERVANT**, 3, 8, 9, 11.

CONVERSION:

See **ACCOUNT**, 1; **TROVER AND CONVERSION**.

CONVEYANCES:

See **DEEDS; MORTGAGES**.

In trust, see **TRUSTS**, 1.

Contracts to convey, see **VENDOR AND PURCHASER**, 1.

In fraud of creditors, see **FRAUDULENT CONVEYANCES**.

Pending action in forcible entry and detainer, see **FORCIBLE ENTRY AND DETAINER**, 1.

CORPORATIONS:

See **BENEFICIAL ASSOCIATIONS; BUILDING AND LOAN ASSOCIATIONS; MUNICIPAL CORPORATIONS; RAILROADS**.

Boonage companies, see **LOGS AND LOGGING**.

Acquisition of property by condemnation, see **EMINENT DOMAIN**, 1, 2.

Filing illegal articles with secretary of state, see **MANDAMUS**, 2.

1. **CORPORATIONS—TRUST COMPANIES—ARTICLES OF INCORPORATION—COMPLIANCE WITH TRUST COMPANY ACT—CONSTRUCTION—RIGHT TO FILE.** Under Laws 1903, p. 317, providing that thereafter no corporation shall be organized to carry on a trust business except under said act, a proposed corporation with powers confined almost wholly to an agency or trust business, with substantially the powers of a trust company, cannot be incorporated under Bal. Code, §§ 4250-4290, although the articles are drawn thereunder and do not follow the language of the act of 1903; or include all the powers of the latter act. *State ex rel. Gorman v. Nichols*..... 437
2. **CORPORATIONS—INSOLVENCY—RECEIVERS—JUDGMENT AGAINST STOCKHOLDERS—RIGHTS OF CREDITORS NAMED IN JUDGMENT.** A judgment in the receivership of an insolvent corporation, entered against the stockholders, in which proceedings the creditors interpleaded, is a judgment in favor of the creditors, where the language clearly and explicitly gives the creditors named a judgment against the stockholders in sums specified, and directed to be paid to the creditors in proportion to the amount due each, although the receiver is directed and authorized to collect the amount; hence the creditors are proper parties plaintiff to an action on the judgment. *Childs v. Blethen*..... 340

CORPORATIONS—CONTINUED.

3. **CORPORATIONS—RECEIVERS—STOCKHOLDERS — INTERLOCUTORY DECREE —EFFECT—LIMITATIONS.** The fact that in a receivership proceeding, an interlocutory judgment was rendered against stockholders of an insolvent corporation, determining who were stockholders and retaining jurisdiction for the purpose of entering judgment, would not deprive the court of jurisdiction to enter a personal judgment, nor would the lapse of six years between the dates of such judgments vacate the jurisdiction of the court. *Childs v. Blethen*..... 340
4. **SAME—FINALITY OF JUDGMENT.** A judgment against the stockholders of an insolvent corporation is a final judgment, where the amount due was definitely determined, and collection directed by execution or suit as may be necessary, although no costs are specified. *Id.*..... 340
5. **SAME—RECEIVER TO COLLECT JUDGMENT—PARTY TO SUIT.** A receiver of an insolvent corporation who is directed by a judgment in favor of the creditors to collect and enforce the same against the stockholders, is a proper party plaintiff in an action upon the judgment, although he may not be a necessary party and is not beneficially interested. *Childs v. Blethen*..... 340
6. **SAME—FOREIGN JUDGMENT AGAINST STOCKHOLDERS—ENFORCEMENT IN ANOTHER STATE.** Where, in a receivership proceeding in Minnesota, all the creditors of the insolvent corporation unite and recover judgment against the stockholders on personal service in that state, they may, together with the receiver, enforce the judgment by an action in this state, against a stockholder who has since removed to this state. *Childs v. Blethen*..... 340
7. **SAME—JUDGMENTS—JOINT OR SEVERAL.** A judgment against several stockholders in favor of the creditors of an insolvent corporation is not a joint judgment where it appears upon its face to be against each stockholder in a certain sum. *Childs v. Blethen*..... 340

COSTS:

On appeal, see **APPEAL AND ERROR**, 38, 39, 62.

Litigation of, see **APPEAL AND ERROR**, 10.

As affecting finality of judgment, see **CORPORATIONS**, 4.

As affecting question of parties, see **COUNTIES**, 2; **VENDOR AND PURCHASER**, 2.

1. **COSTS—IN SUPREME COURT—ATTORNEY FEE—ORIGINAL PROCEEDING—STATUTE—REPEAL BY IMPLICATION—CONSTRUCTION.** Under subdivision 5 of the Code of 1881 (2 Hill's Code, § 829), providing for an attorney's fee of \$15 in all actions where judgment is rendered in the supreme court, such fee may be taxed in an original proceeding for a writ of review; and said section was not impliedly repealed by the act of 1893 (Bal. Code, § 6528), which is applicable only to cases appealed to the supreme court. *State ex rel. Spokane Terminal Co. v. Superior Court*..... 453

COSTS—CONTINUED.

2. **COSTS—IN WHAT ACTIONS TAXABLE—CERTIORARI.** An application for a writ of certiorari under Bal. Code, § 4793, is an "action," within the meaning of the statute relating to the taxation of costs. *State ex rel. Spokane Terminal Co. v. Superior Court*..... 453
3. **COSTS—ON REVERSAL IN CRIMINAL CASE—TAXATION AGAINST STATE—STATUTES—CONSTRUCTION—LONG ACQUIESCENCE IN PRACTICE.** Under Bal. Code, §§ 1627, 5182, 6528, and 7009, the costs on appeal in a criminal case, where the appellant is successful, are taxable against the state, especially in view of the uniform construction that has been placed thereon for years, and acquiesced in by the legislature. *State v. Rutledge*..... 9

COUNTIES:

See TAXATION.

Escheated estates, see EJECTMENT, 1, 2; ESTOPPEL, 1.

Officers as parties in prosecution for obstructing highway, see CONTEMPT, 3.

Recovery of tax refunded on fraudulent certificate, see HIGHWAYS, 1, 2; LIMITATION OF ACTIONS, 3.

Review of action of county commissioners in establishment of school district, see CERTIORARI, 1.

1. **COUNTIES—MANDAMUS TO COMPEL LIQUIDATION OF DITCH WARRANTS—ADJOURNMENT OF BOARD FOR PURPOSES OF DELAY—FAILURE TO ACT.** Where the county commissioners are petitioned to establish a ditch fund and levy an assessment, by a creditor who has already waited eleven years, and they take no action on the petition except to postpone consideration until the next regular term, any valid reason for such continuance is matter of defense, and cannot be urged by the county upon a demurrer to a petition for a mandate to compel action, where the petition alleges that they do not intend to take any action in the matter or pay the indebtedness. *Espy Estate Co. v. Pacific County*..... 67
2. **MANDAMUS—TO COUNTY COMMISSIONERS—COUNTY WHEN PROPER PARTY.** In a proceeding to compel the county commissioners to establish a ditch fund and levy a special assessment, to pay warrants issued in part payment of a ditch, the county is a proper party defendant, having at least an indirect interest in the property, and perhaps a direct interest in the costs. *Espy Estate Co. v. Pacific County*..... 67
3. **SAME—COMPLETION OF DITCH—ABANDONMENT OF PROJECT—FAILURE OF COUNTY TO LEVY ASSESSMENT OR ACQUIRE TITLE TO NECESSARY LAND.** Where the county commissioners abandon proceedings for the construction of a ditch for a drainage district, and the property owners take no steps to compel action for six months, a creditor of the district, holding warrants issued in part payment of the ditch, may sue to require the establishment of a ditch fund and the levy of an

COUNTIES—CONTINUED.

- assessment upon the property benefited or to be benefited, and it would be no defense that the ditch is not completed or that the title to necessary property had not been acquired. *Espy Estate Co. v. Pacific County*..... 67
4. SAME—LACHES OF WARRANT HOLDER—SUIT WITHIN SIX MONTHS OF ABANDONMENT OF PROCEEDINGS. The holder of warrants of a drainage district is not guilty of laches in enforcing an assessment where he commenced suit within six months after the abandonment of the project by the county. *Espy Estate Co. v. Pacific County*..... 67
5. SAME—POWERS OF COURT. In a proceeding by a warrant holder to compel the levy of an assessment to pay warrants upon an abandoned ditch project, the court could direct the levy of an assessment without completion of the ditch, or could direct its completion and the acquisition of necessary property to be followed by an assessment. *Espy Estate Co. v. Pacific County*..... 67
6. COUNTIES—SALE OF PROPERTY—TERMS—MINUTES OF COUNTY BOARD. As the minutes of the proceedings of the board of county commissioners do not constitute the exclusive evidence of their official action, evidence of the members is competent to show that a sale of county property mentioned in the minutes was to be made subject to the approval of the board. *Phillips v. Welts*..... 501
7. SAME—COUNTY COMMISSIONERS—POWERS—ORDERING SALE SUBJECT TO APPROVAL. The board of county commissioners, as the business managers of the county, have the power, in ordering sales of county property, to require that the sales shall be subject to their approval, under Laws 1903, p. 73, providing that they may fix the terms of sale. *Phillips v. Welts*..... 501
8. COUNTIES—COUNTY COMMISSIONERS—FRANCHISE FOR LAYING WATER PIPES IN HIGHWAY—AUTHORITY TO GRANT. The county commissioners have no power to grant a franchise or permit to a water company for the purpose of laying water pipes under or along a public highway, since the power must be derived from the legislature, and cannot be implied from Bal. Code, § 342, giving them power to lay out and construct county roads. *State ex rel. Spring Water Co. v. Monroe*..... 545
9. SAME—VOID FRANCHISE—PLEA OF RATIFICATION—NO ESTOPPEL IN CASE OF ULTRA VIRES. A water company that has made expenditures in reliance upon a franchise granted by public officers having no power to do so cannot claim a ratification, since the plea of estoppel does not prevail against the defense of *ultra vires*. *State ex rel. Spring Water Co. v. Monroe*..... 545

COUNTY COMMISSIONERS:

See COUNTIES.

Establishment of new school district, see SCHOOLS AND SCHOOL DISTRICTS, 4.

COURTS:

- Contempt of court, see CONTEMPT.
- Legislative power, see CONSTITUTIONAL LAW, 1.
- Mandamus to inferior courts, see MANDAMUS, 1, 3.
- Prohibition to inferior courts, see PROHIBITION, 1.
- Question for court, see CONTRACTS, 5.
- Receivership, jurisdiction, see CORPORATIONS, 3.
- Review of decisions, see APPEAL AND ERROR; CERTIORARI.
- Review of engineer's estimates, see CONTRACTS, 6.
- Review of proceedings of mutual benefit associations, see BENEFICIAL ASSOCIATIONS, 1, 2.
- Powers, proceeding for payment of warrants of abandoned ditch project, see COUNTIES, 5.

CREDITORS:

- See BANKRUPTCY; FRAUDULENT CONVEYANCES.
- Bar of order in receivership, see JUDGMENT, 13.
- Of insolvent corporation, see CORPORATIONS, 2-7.
- Compelling assessment to pay ditch warrants, see COUNTIES, 1-5.

CRIMINAL LAW:

- See CONTEMPT.
- Jury, see JURY, 1.
- Appeal in capital case, see APPEAL AND ERROR, 19.
- Bail, see APPEAL AND ERROR, 20; BAIL, 1, 2.
- Costs in criminal prosecutions, see APPEAL AND ERROR, 5; COSTS, 3.
- Disturbing school, see JURY, 1.
- Extradition of persons accused, see EXTRADITION, 1.
- Habeas corpus to obtain release, see HABEAS CORPUS.

I. INFORMATION AND DEFINITIONS.

- Complaint at former trial as evidence, see CRIMINAL LAW, 18.
- Filing of new complaint upon appeal from justice's court, see CRIMINAL LAW, 22.
- Robbery, information, see CRIMINAL LAW, 20, 21.

1. **CRIMINAL LAW—INFORMATION—DEGREES OF OFFENSE.** A charge of exhibiting a dangerous weapon is not necessarily involved in the crime of assault with intent to commit murder, and a dismissal of the former charge is not a bar to a prosecution of the latter. *State v. Campbell*..... 480
2. **CRIMINAL LAW—FORMER JEOPARDY—DISMISSAL OF CHARGE FOR MISDEMEANOR AS BAR TO INFORMATION FOR FELONY—STATUTES—CONSTRUCTION.** The constitutional prohibition against placing a person twice in jeopardy is not violated by the filing of an information charging an assault with intent to commit murder, after the dismissal of a prosecution for exhibiting a dangerous weapon, which is a misde-

CRIMINAL LAW—CONTINUED.

- meanor only; since Bal. Code, § 6916, providing that the dismissal of a prosecution for a misdemeanor shall be a bar to a further prosecution was not intended to apply to prosecutions for felony, and since the misdemeanor named was not necessarily included in the later charge. *Id.*..... 480
3. SAME—INFORMATION—ALLEGING ASPORTATION. An information for robbery charging the offense in the language of the statute is sufficient without alleging asportation other than by stating that the accused took the property from the person of the prosecuting witness. *State v. Smith*..... 615
4. CRIMINAL LAW—PLACING WIFE IN HOUSE OF PROSTITUTION—PLEADING—INFORMATION—DUPLICITY—STATUTES—CONSTRUCTION. An information charging the crime of placing a wife in a house of prostitution and allowing and permitting her to remain in such house, is not bad for duplicity, since any one or all of the series of acts constituting the crime may be charged in a single count and constitute but one offense. *State v. Ilomaki*..... 629
5. CRIMINAL LAW — DISTURBING SCHOOL — STATUTES — CONSTRUCTION. Laws 1903, p. 328, prescribing a penalty for disturbing a public school by any "person" applies to and includes a "pupil" of such school who was not attending the school at the time the offense was committed and was outside of the school building. *State v. Packenham*..... 403
6. STATUTES—TITLE—SUFFICIENCY. Laws 1903, p. 325, entitled, an act relating to the public schools, defining certain offenses and providing penalties, is not open to the objection that it embraces more than one subject which is not expressed in its title, by reason of including in the general law pertaining to school matters provisions prescribing a penalty for minor offenses relating to the public schools. *Id.*.... 403
- II. EVIDENCE.
7. CRIMINAL LAW—EVIDENCE—BURDEN OF PROOF—CONSTITUTIONALITY OF STATUTE. The statute making certain records *prima facie* evidence of the existence or nonexistence of a license to practice medicine, is not unconstitutional as imposing the burden of proof upon the accused. *State v. Lawson*..... 455
8. PHYSICIANS AND SURGEONS—PRACTICING WITHOUT LICENSE—PROSECUTION—PROOF OF LICENSE—RECORDS. Upon a prosecution for practicing medicine without a license, there is sufficient *prima facie* evidence of the fact that the accused had no license where it was shown (1) that the secretary of the board of examiners had never issued him a license, (2) that he had filed no license with the county clerk, and (3) that his name did not appear on the records of the county auditor as a licensed physician. *Id.*..... 455

CRIMINAL LAW—CONTINUED.

9. EVIDENCE—LETTERS FROM THIRD PERSON—INADMISSIBLE AS EVIDENCE OF FACTS STATED. Upon a prosecution for tampering with a witness, letters from her to the accused are inadmissible as original evidence of the facts recited in them. *State v. Bringgold*..... 12
10. SAME—WITNESS TAMPERED WITH NOT SUBPOENAED. Upon a prosecution for tampering with a witness, it is immaterial whether or not the witness had been subpoenaed. *Id.*..... 12
11. CRIMINAL LAW—CATTLE STEALING—JUSTIFICATION UNDER AGREEMENT—CROSS-EXAMINATION—MISTAKE AS TO CATTLE REFERRED TO. Upon a prosecution for the larceny of four head of cattle running on the range, the taking of which is admitted and justified under an alleged agreement with the owner that the accused could take up and sell four steers of the same brand, not gathered by the owner the winter before, the accused has the right, after the prosecuting witness has testified that he did not authorize the accused to take up and sell the cattle described in the information, to show on cross-examination the aforesaid agreement, without confining the inquiry to the cattle specified in the information; since the cross-examination is directly connected with the testimony in chief, and the taking of any cattle in good faith under the agreement would be a complete defense to the accusation. *State v. Strodemier*..... 608
12. CRIMINAL LAW—EVIDENCE AS TO PREVIOUS CHARGES AGAINST ACCUSED. Upon a prosecution for larceny it is unnecessary, and prejudicial error, for the state, in order to lay a foundation for introducing the testimony of the accused on former trials, to show that the accused had twice before been charged with and put on trial for similar offenses. *Id.*..... 608
13. SAME—LAYING FOUNDATION. Such evidence is not justified in the state's case in chief, as a foundation for the evidence on the former trial, since it is only when desired for impeachment that it is necessary to lay a foundation by showing the time, place, and circumstances of the statement. *Id.*..... 608
14. CRIMINAL LAW—HOUSE OF PROSTITUTION—KNOWLEDGE OF DEFENDANT—GENERAL REPUTATION—EVIDENCE. Upon a prosecution for the crime of placing a wife in a house of prostitution, evidence of the general reputation of the house is proper, the court instructing the jury that the defendant must be shown to have known that it was a house of prostitution. *State v. Nomaki*..... 629
15. CRIMINAL LAW—EVIDENCE OF JUSTICE OF PEACE BEFORE WHOM DEFENDANT WAS TRIED—ADMISSIBILITY. A justice of the peace is a competent witness concerning the facts that occurred before him on a previous trial of the case. *State v. Bringgold*..... 12
16. CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWAL—EVIDENCE AS ADMISSION OF DEFENDANT. A plea of guilty in a justice's court that has

CRIMINAL LAW—CONTINUED.

- been withdrawn is competent evidence as an admission upon the trial of the cause *de novo* in the superior court. *Id.*..... 12
17. **CRIMINAL LAW—TAMPERING WITH WITNESSES—EVIDENCE OF DEFENDANT'S KNOWLEDGE OF PENDENCY OF SUIT.** Upon a prosecution for tampering with a witness in a certain cause, the record in such cause is admissible where there was other evidence that the defendant knew that such cause was in progress at the time in question. *Id.*..... 12
18. **SAME—RECORD OF FORMER CASE—IDENTIFICATION OF COMPLAINT—WHEN ADMISSIBLE WITHOUT AUTHENTICATION.** Upon a prosecution for tampering with a witness in a certain cause, a complaint, to which the defendant had pleaded guilty at a former trial, is admissible in evidence without authentication, when there is evidence that it had been read over to the accused at the former trial and was identified as the same complaint to which he had pleaded guilty. *Id.*..... 12
19. **CRIMINAL LAW—TAMPERING WITH WITNESS—PERSUASION—THREATS—EVIDENCE—SUFFICIENCY.** Upon a prosecution for tampering with a witness, the evidence is sufficient to sustain a conviction, where it appears that the accused, for the purpose of obstructing the course of justice, endeavored to persuade the witness not to testify, and resorted to threats to blacken her good name if she did so; and in such case the evidence does not warrant the giving of an instruction to acquit if the jury find that accused advised the witness to do her duty and tell the truth. *Id.*..... 12
20. **CRIMINAL LAW—ROBBERY—EVIDENCE—SUFFICIENCY—UNCERTAINTY OF REFERENCES BY WITNESS.** The evidence of a robbery committed by the accused is not insufficient by reason of the fact that only two of the three persons charged participated in the crime and the references in the record on appeal to the gestures of the witness do not make clear to whom reference was made, there being competent evidence warranting the verdict. *State v. Smith*..... 615
21. **SAME—OWNERSHIP OF PROPERTY—PLEADING AND PROOF—VARIANCE—TITLE TO MONEY.** Under an information charging robbery by the taking of a certain sum of money belonging to the prosecuting witness, evidence that part of the money taken belonged to him is sufficient proof of title to sustain a conviction. *Id.*..... 615

III. TRIAL—INSTRUCTIONS.

22. **CRIMINAL LAW—APPEAL FROM JUSTICE'S COURT—TRIAL DE NOVO AFTER SUSTAINING DEMURRER TO COMPLAINT IN JUSTICE'S COURT.** Upon appeal from a justice's court in a criminal case, the superior court has jurisdiction of the cause for trial *de novo*, and after sustaining a demurrer to the complaint below, may direct a new complaint or information to be filed. *State v. Bringgold*..... 12

CRIMINAL LAW—CONTINUED.

23. CRIMINAL LAW — YOUTHFUL OFFENDERS — HEARING IN SUPERIOR COURT—FAILURE TO APPEAL. A boy between the ages of 8 and 16 years, convicted before a justice of the peace of disturbing a public school, who fails to appeal from said judgment to the superior court, is not entitled to a rehearing on said charge or a trial by jury upon the certification of the proceedings to the superior court for the purpose of determining whether he should be sent to the reform school. *State v. Pakenham*..... 403
24. CRIMINAL LAW—YOUTHFUL OFFENDERS—CERTIFICATION OF PROCEEDINGS TO SUPERIOR COURT—JURISDICTION. Under Bal. Code, §§ 6722, 6724, upon the conviction before a justice of the peace of a boy between the ages of 8 and 16 years, for disturbing a public school, it is the duty of the justice to certify the proceedings to the superior court for the purpose of determining whether the offender is a fit subject for the reform school; and in such case the justice has jurisdiction of the offense, and there is no trial before the superior court for the purpose of ascertaining the guilt or innocence of the accused. *Id.*..... 403
25. SAME — TRIAL — EXCLUDING WITNESSES FROM COURT ROOM—WITNESSES DISOBEYING ORDER. It is not error to permit witnesses to testify who for a short time disobeyed an order of court excluding the witnesses from the court room, where no collusion was shown between the witnesses and the prosecution. *State v. Ilomaki*.... 629
26. SAME—CONSENT OF HUSBAND—GOOD FAITH OF PROTESTS. Upon a prosecution for the crime of placing a wife in a house of prostitution where defendant claims to have protested against his wife's going or remaining there, it is proper to instruct that such protests must have been *bona fide* and not made merely for a defense, especially where the wife actually remained there and the accused lived with her at such place. *Id.*..... 629
27. CRIMES—INSTRUCTIONS—EXCEPTIONS. Error cannot be predicated upon instructions not excepted to within the time prescribed by statute. *State v. Bringgold*..... 12
- IV. APPEAL AND ERROR, AND CERTIORARI.
- Evidence to sustain conviction of tampering with witness, see CRIMINAL LAW, 19.
- Evidence to sustain conviction of robbery, see CRIMINAL LAW, 20, 21.
28. APPEAL—REVIEW—IMMATERIAL EVIDENCE. Error cannot be predicated on the rejection of immaterial evidence having no bearing on the case. *State v. Bringgold*..... 12
29. APPEAL—RECORD—STATEMENT OF FACTS. Upon an appeal from a judgment of the superior court, upon the certification of proceedings before a justice of the peace, wherein a youthful offender was con-

CRIMINAL LAW—CONTINUED.

- victed of disturbing a public school, errors during the progress of the hearing cannot be reviewed in the absence of a statement of facts. *State v. Packenham*..... 403
30. **SAME—FAILURE TO FILE TRANSCRIPT, STATEMENT OF FACTS, AND BRIEFS—DISMISSAL.** An appeal, even in a capital case, must be dismissed, where no transcript, statement of facts, or briefs are filed, and there is no error in the record subject to review. *State v. White*..... 428
31. **APPEAL—REVIEW—QUASHING WRIT OF CERTIORARI NOT REVIEWED ON SUBSEQUENT APPEAL FROM THE JUDGMENT.** Error in refusing to quash a writ of certiorari from a justice's court, appeal from which was taken but not perfected, cannot be reviewed on a subsequent appeal from a conviction thereafter had in the superior court. *State v. Briggold*..... 12
32. **VENUE—CHANGE—PREJUDICE OF JUDGE—RELATIONSHIP TO PROSECUTING WITNESS—ABUSE OF DISCRETION.** The fact that the trial judge is a brother of the prosecuting witness is not alone sufficient to sustain a charge of prejudice, and a denial of a motion for a change of venue based on such fact will not be reviewed except for abuse of discretion. *State v. Strodemier*..... 608
33. **SAME—PREJUDICE OF JUDGE—ERRONEOUS RULINGS.** Erroneous rulings of a judge during the trial, after the denial of a motion for a change of venue, do not convict him of prejudice entitling the accused to the change. *Id.*..... 608

CROSS-EXAMINATION:

See CRIMINAL LAW, 11; MECHANICS' LIENS, 4.
Not prejudicial, see APPEAL AND ERROR, 55.

CUSTODY:

Of children, see APPEAL AND ERROR, 28; DIVORCE, 1, 2.

CUSTOMS AND USAGES:

Of city in disregarding charter, effect on contract, see MUNICIPAL CORPORATIONS, 5.
As to duty of sawyer as evidence, see MASTER AND SERVANT, 14.

DAMAGES:

See FORCIBLE ENTRY AND DETAINER, 1; LIBEL AND SLANDER, 2-4.
Breach of contract, see APPEAL AND ERROR, 59.
Breach of warranty, see SALES, 1-3.
For unlawfully cutting timber, see ACTION, 1.
Fires caused by operation of railroad, see RAILROADS, 2-5.
Loss to shipment of livestock, claim, pleading, see CARRIERS, 4-10.
Release procured by fraud as defense, see RELEASE, 1.
For trespass in exercise of governmental function, see MUNICIPAL CORPORATIONS, 1.
Problematical as ground for injunction, see WATERS, 7.

DANGER:

Master's duty to warn servant, see **MASTER AND SERVANT**, 3-6, 8.

DEATH:

Of party after divorce, vacation of decree, see **DIVORCE**, 3, 4.

DEBTOR AND CREDITOR:

See **FRAUDULENT CONVEYANCES**.

Remedy against debtors severally liable, see **ELECTION OF REMEDIES**, 1.

DECISION:

On appeal, see **APPEAL AND ERROR**, 37, 61, 62; conclusiveness, see **INJUNCTION**, 1.

DECLARATIONS:

Of agency as evidence in civil actions, see **EVIDENCE**, 2.

DECREE:

In divorce, modification, vacation, see **DIVORCE**, 1-4.

DEEDS:

In trust, see **TRUSTS**, 1.

Reformation, see **REFORMATION OF INSTRUMENTS**, 1.

Absolute deed as mortgage, see **MORTGAGES**, 5.

Cancellation for fraud, see **VENDOR AND PURCHASER**, 2-4.

Invalidity as defense in accounting, see **ACCOUNT**, 1.

1. **DEEDS — DESCRIPTION — CONSTRUCTION — ERRONEOUS REFERENCE TO FORMER CONVEYANCES—INCONSISTENT DESCRIPTION OF WATER RIGHTS—INTENTION OF PARTIES.** Where a deed excepted certain water rights previously carved out of the estate, describing the same in two ways: (1) by reference to the water specifically describing the volume; and (2) by reference to the deed in which the water right was originally granted, which, however, described a smaller volume of water, and which water deed was also erroneously referred to as recorded in vol. 5, page 9; and a purchase money mortgage is given back to the grantors, also describing the reserved water in two ways, viz.: (1) by reference to the water deed recorded in vol. 5, page 9, and (2) by reference to the deed to the mortgagees, the mortgage expressly granting "the same premises" conveyed to the mortgagees; the intention of the parties, which must control as to the inconsistent descriptions, was to mortgage the identical property conveyed to the mortgagees reserving the water as therein described, and not as described in the water deed, with which the mortgagors and mortgagees were not familiar, as shown by the erroneous reference to the record thereof; since of two inconsistent descriptions, the erroneous one will be rejected as surplusage. *Schmidt v. Olympia Light etc. Co.*..... 131

DEEDS—CONTINUED.

2. **SAME—BONA FIDE PURCHASER—INCONSISTENT DESCRIPTIONS BOTH OF RECORD—CONSTRUCTIVE NOTICE.** One claiming under a mortgage containing two inconsistent descriptions of the rights conveyed, one by reference to one deed and the other by reference to another deed, both of record, does not occupy any better position than the original mortgagee, and is not a *bona fide* purchaser, but takes with constructive notice of all the records. *Id.*..... 131

DEFAMATION:

See **LIBEL AND SLANDER.**

DEFAULT:

Vacation, see **JUDGMENTS**, 8, 10.

DELAY:

As ground for dismissal of action, see **ACION**, 3; 4.

In prosecuting will contest, injunction as excuse, see **WILLS**, 3.

DEMAND:

For jury, see **JURY**, 1.

DEMURRER:

In pleading, see **PLEADING**, 1, 3.

DEPOSIT:

In bank, see **BANKS AND BANKING**, 1, 2.

Liability of private banker for, see **FRAUD**, 1.

DEPOSITS IN COURT:

In lieu of bail, see **BAIL**, 1.

DESCENT AND DISTRIBUTION:

See **ACCOUNT**, 1; **WILLS**.

Claim of wife to estate as proof of family relation, see **HUSBAND AND WIFE**, 2.

DESCRIPTION:

Of property conveyed, see **DEEDS**, 1, 2.

DILIGENCE:

In constructing boom extensions, see **LOGS AND LOGGING**, 2, 3.

In claiming surprise and requesting continuance, see **NEW TRIAL**, 3.

DIRECTING VERDICT:

In civil actions, see **TRIAL**, 1.

DISCHARGE:

Of surety, see **INDEMNITY**, 3, 4.

Of claim for personal injuries, see **RELEASE**, 1.

DISCRETION OF COURT:

See APPEAL AND ERROR, 47; MUNICIPAL CORPORATIONS, 3; abuse of, see JUDGMENT, 6, 10; PLEADING, 3.

DISMISSAL AND NONSUIT:

See JUDGMENT, 4.

At trials, see TRIAL, 1.

Dismissal of appeal, see APPEAL AND ERROR, 26, 27, 30, 34, 36-43.

Appealability of order of dismissal, see APPEAL AND ERROR, 6.

Of action for attachment, see ATTACHMENT, 1, 2.

Of action for want of prosecution, see ACTION, 3, 4.

Of application to vacate judgment, see NEW TRIAL, 2.

As bar to prosecution for greater offense, see CRIMINAL LAW, 1, 2.

Cessation of controversy, see WATERS, 5.

Of will contest for want of prosecution, see WILLS, 3.

DISSOLUTION:

Of partnership, see PARTNERSHIP, 2-4.

DISTRIBUTION:

Of escheated estate, title, see EJECTMENT, 1.

In receivership as *res judicata*, see JUDGMENT, 13.

Of assets upon dissolution of partnership, see PARTNERSHIP, 4.

DITCHES:

Compelling assessment to pay ditch warrants, see COUNTIES, 1-5.

DIVERSION:

Of water, see WATERS, 1-3.

Wrongful diversion of special fund, see MUNICIPAL CORPORATIONS, 8, 9.

DIVORCE:

Custody of children, see APPEAL AND ERROR, 28.

Review, see APPEAL AND ERROR, 48.

Vacation, see JUDGMENT, 7.

1. DIVORCE—ACTION TO MODIFY DECREE—CUSTODY OF CHILDREN—WELFARE PARAMOUNT CONSIDERATION—CONDITION OF PARENTS—SCHOOL ADVANTAGES—WISHES OF CHILDREN—EVIDENCE—SUFFICIENCY. The custody of minor children being determined by considerations as to their welfare, rather than the claims of the parties, it is error to enforce a decree of divorce requiring the mother to relinquish to the father the custody of two boys after they attain the age of ten years, where it appears that both parties have remarried, that the mother is permanently located near the best of schools, which they attend, has no other children and is able to and does give them the best of care and attention; while the father has no permanent location, is much away from home, has another child, and took no steps for several

DIVORCE—CONTINUED.

- years to secure their custody when entitled thereto, and discontinued contributing to their support; especially where both children are attached to the mother and prefer to remain with her. *Kane v. Miller*..... 125
2. **SAME—CONCLUSIVENESS OF DECREE IN ABSENCE OF APPEAL—AWARD NOT FINAL—CHANGE IN CONDITIONS.** A decree of divorce unappealed from, awarding the custody of children to one of the parties, is not final, if the award was subject to the further order of the court; nor is it final where the conditions of both parties have been changed by remarriage and other conditions affecting the welfare of the children. *Id.*..... 125
3. **DIVORCE—DECREE—PROCEEDING TO VACATE AFTER DEATH OF PARTY—SUBSTITUTION OF EXECUTORS—NO SUBJECT OF LITIGATION.** An action for a divorce is purely personal, and upon the death of either party, the subject-matter of the action is eliminated and a judgment for divorce cannot be thereafter vacated for want of jurisdiction to render it. *Dwyer v. Nolan*..... 459
4. **SAME—CONSENT OF EXECUTORS.** After the death of a party to a decree of divorce, his executors cannot consent to the vacation of the decree or be substituted as parties for the purpose of service of notice. *Id.*..... 459

DOCUMENTS:

As evidence in civil actions, see **EVIDENCE**, 1.

DUPLICITY:

Information, see **CRIMINAL LAW**, 4.

EJECTMENT:

See **TAXATION**, 4.

Dismissal for laches, see **ACTION**, 3.

1. **EJECTMENT—TITLE—TRACING TO RELIABLE SOURCE—FINDINGS—EVIDENCE—SUFFICIENCY.** A decree of distribution of an escheated estate, with a deed from the county, does not show sufficient title in the plaintiff to maintain an action of ejectment, where the title of the deceased was not traced to the government, a grantor in possession, or a common source of title; since such distribution does not convey a warranted title but only such interest as the deceased had. *Helm v. Johnson*..... 420
2. **EJECTMENT—TITLE OF PLAINTIFF.** In ejectment, plaintiff must recover, if at all, upon the strength of his own title. *Id.*..... 420

ELECTION OF REMEDIES:

1. **ELECTION OF REMEDIES—JOINT DEBTORS.** Where two are severally liable to pay the same debt, an attempt to collect from one is not such an election of remedies as to bar an action against the other upon failing to collect the whole debt in the first action. *Johnson v. Shuey*..... 22

ELECTIONS:

Restraining by injunction, see **INJUNCTION**, 1, 2; **MUNICIPAL CORPORATIONS**, 2, 3.

ELECTRICITY:

Enforcing contract to supply to street railroad, see **SPECIFIC PERFORMANCE**, 1, 2.

EMINENT DOMAIN:

See **WATERS**, 3.

Condemnation of lands for boom, see **LOGS AND LOGGING**, 1-5.

Public improvements by municipalities, see **MUNICIPAL CORPORATIONS**.

1. **EMINENT DOMAIN—APPLICATION BY RAILWAY TO CONDEMN LANDS APPROPRIATED BY ANOTHER RAILWAY—NECESSITY—FINDINGS—EVIDENCE—SUFFICIENCY.** No sufficient necessity is shown for a condemnation by one railroad of lands appropriated by another railroad for its city terminals, already restricted on one side by a river and on the other by another railroad, where it appears that the lands were hardly sufficient, and were absolutely required by the defendant company, that the petitioner's ostensible object of the condemnation was to reach certain business houses and manufacturing plants to which it already had means of access over the tracks of another railroad company, and also by other routes, and the only reason why it did not reach the point over several other available routes was the question of expense, and there was no attempt to show what such extra expense would be; since the necessity must be great to justify the right to appropriate the terminal grounds of another company. *State ex rel. Spokane Falls etc. R. Co. v. Superior Court*..... 389
2. **SAME—DEFENDANT RAILWAY NOT IN OPERATION—ROAD BEING ESTABLISHED—LANDS PURCHASED FOR TERMINALS—PROTECTION OF RIGHTS.** A railroad company not yet in operation will be protected from the appropriation of its terminal rights to the same degree as a road that is in operation, where it appears that it is constructing its road, and would be in operation in the near future, and had spent large sums in securing terminals; since it is necessary to secure terminal facilities before beginning operation. *Id.*..... 389

EMPLOYEES:

See **MASTER AND SERVANT**.

Of fire department, negligence, liability of city, see **MUNICIPAL CORPORATIONS**, 1.

EQUITY:

See **INJUNCTION**; **REFORMATION OF INSTRUMENTS**; **SPECIFIC PERFORMANCE**; **TRUSTS**.

Equitable estoppel, see **ESTOPPEL**.

Tender, payment into court, see **TAXATION**, 6.

ESCHEAT:

See ESTOPPEL, 1.

County deed of escheated estate as basis for ejectment, see EJECTMENT, 1, 2.

ESCROWS:

1. ESCROWS—CERTIFICATE OF STOCK—DELIVERY UPON STIPULATED PAYMENTS—ACTION BY VENDOR FOR POSSESSION—NON-PERFORMANCE BY VENDEE—EVIDENCE—DIRECTING VERDICT FOR DEFENDANT. Where stock was delivered to a bank in escrow to be delivered to a purchaser upon the payment of \$2,000 in certain monthly installments, a finding of a substantial compliance with the contract upon the part of the purchaser is sustained by the evidence, where it appears that it was arranged that, during the owner's absence from the state, he should draw on the bank for the amounts due, that \$1,000 was deposited to his credit in monthly installments practically as agreed upon, before he returned, at which time \$300 was past due, and he was informed that the purchaser had been waiting for him to draw, when the funds would be ready; that the day after his return the \$300 was deposited before any demand was made by him, and at the time of his demand for the stock, three or four days later, nothing was due on the contract; and in an action by him to recover the stock, a verdict is properly directed for the defendant. *Boyd v. American Savings Bank*..... 571

ESTABLISHMENT:

Of wills, see WILLS.

Of school districts, see SCHOOLS AND SCHOOL DISTRICTS, 3-5.

ESTATES:

Trusts, see TRUSTS, 1.

ESTOPPEL:

See BANKRUPTCY, 1; NEW TRIAL, 2.

Of contractor, see CONTRACTS, 2.

To rescind sale, see SALES, 5, 6.

In favor of franchise void as ultra vires, see COUNTIES, 9.

To attack tax foreclosure judgment, see TAXATION, 5.

To complain of private examination of witnesses by court, see APPEAL AND ERROR, 56.

To object to diversion of water, see WATERS, 1.

Of county by act of officer, see HIGHWAYS, 1, 2.

Of creditor to question validity of sale, see FRAUDULENT CONVEYANCES, 2.

Of municipality by receiving benefits of invalid contract, see MUNICIPAL CORPORATIONS, 7.

Of surety on appeal bond, see APPEAL AND ERROR, 41.

ESTOPPEL—CONTINUED.

1. **ESTOPPEL—STALE CLAIM—LACHES IN ASSERTING UNRECORDED RIGHT TO PURCHASE-MONEY LIEN—BONA FIDES OF CLAIM—EVIDENCE.** The owner of an undisclosed title to a claim for a purchase-money lien upon real estate, is guilty of laches, which will bar a recovery as upon a stale claim, where he had knowledge of expensive litigation by the county against the apparent owners of record, in which it was adjudged that the land had escheated to the county, and asserted no claim, during the pendency of the suit, or for more than five years after the suit was commenced, especially where there was evidence showing that the claim for a lien was not *bona fide*. *Stuart v. Pierce County*..... 267
2. **ESTOPPEL — ADVERSE POSSESSION OF STREETS — COMMUNITY PROPERTY—PETITION TO VACATE STREETS SIGNED BY HUSBAND.** Where the title is taken to platted real estate in the name of the wife, and the husband petitioned the city council for the vacation of certain dedicated streets occupied by them, and running through the premises, which petition was denied, the property being presumably community property, the parties must be held to have recognized the rights of the city in and to the streets and cannot invoke the equitable doctrine of estoppel against the city's right to assert dominion over the streets, by ordering the removal of obstructions and permanent improvements thereon. *Unzelman v. Snohomish*..... 588

EVIDENCE:

See TRIAL, 1; TROVER AND CONVERSION, 1; WITNESSES.

Harmless error in rulings on, see APPEAL AND ERROR, 50, 52, 53, 55; CRIMINAL LAW, 28.

Incorporation in record on appeal, see APPEAL AND ERROR, 25-29, 31.

Pleading and proof, variance, etc., see PLEADING, 4, 5.

Review on appeal, see APPEAL AND ERROR, 13-17, 25-29, 31, 46, 48-50, 52, 53, 55, 56.

As to particular facts or issues: See BILLS AND NOTES, 1-3. Compliance with conditions of escrow, see ESCROWS, 1. Of diligence in use of boom locations, see LOGS AND LOGGING, 3. Establishment of trust, see TRUSTS, 1. Of estoppel, see ESTOPPEL. Existence of family relation, see HUSBAND AND WIFE, 2. Fire started by locomotive, see RAILROADS, 2. Of fraud of attorney, see JUDGMENT, 12. Of fraudulent release of claim for personal injuries, see RELEASE, 1. Of modification of contract, see CONTRACTS, 7. For modification of divorce as to custody of children, see DIVORCE, 1, 2. Of property held in trust, see HUSBAND AND WIFE, 1. To rebut presumption of negligence, see CARRIERS, 3.

In actions by or against particular classes of parties: Of action of county board, minutes, see COUNTIES, 6. Of indulgence to contractor not pleaded, see INDEMNITY, 4. Invalidity of contract to render

EVIDENCE—CONTINUED.

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mand on the purchasers and waits for a year before attempting to reach the proceeds of the sale by garnishment, the debtor meanwhile becoming execution proof, the creditor is estopped to question the validity of the sale. *First National Bank v. Coles*..... 528

3. **FRAUDULENT CONVEYANCES—SALES—STOCK OF GOODS IN BULK—LIVERY STABLE—STATUTE—CONSTRUCTION.** The sales in bulk act requiring the purchaser of any stock of goods, wares or merchandise in bulk to demand a list of the vendor's creditors and see to the application of the proceeds of the sale, does not apply to the sale of the horses, harness, carriages, and all the property in a livery stable; since the act applies only to goods kept for sale. *Everett Produce Co. v. Smith Brothers*..... 566

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1. **HABEAS CORPUS—JUDGMENT OF CONVICTION—CONCLUSIVENESS—OFFENSE COMMITTED ON MILITARY RESERVATION—PLEA OF GUILTY—WANT OF JURISDICTION NOT APPEARING IN RECORD.** A conviction, upon a plea of guilty, of an offense in a certain county, is conclusive upon application for a writ of habeas corpus, and cannot be attacked by evidence that the crime was committed on a United States military reservation in said county, over which the state court, in which the conviction was had, had no jurisdiction, where there was nothing before that court to show the fact claimed; since the petitioner waived the defense and is concluded by his plea of guilty and the judgment of conviction. *In re Russell*..... 244

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1. HIGHWAYS — TAXES — REFUND CERTIFICATES — RECOVERING MONEY PAID ON FRAUDULENT CERTIFICATE. Where a railroad company employed a county road supervisor to work out its road tax, for the purpose of securing a refund of the taxes paid to the county, the supervisor acts as the agent of the company and not in his official capacity and the railroad company would be liable to the county for the amount of the refund received by it in good faith upon the fraudulent certificate of the supervisor, issued without having done the work; since the knowledge of the supervisor as agent of the company would be imputed to it, and in such case the county would not be estopped by reason of the act of the supervisor as its officer. *Walla Walla County v. Oregon R. & Nav. Co.*..... 398
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1. HUSBAND AND WIFE—PROPERTY—REAL ESTATE HELD BY WIFE IN TRUST FOR SON—ACTION BY HUSBAND TO RECOVER FOR COMMUNITY—CHARACTER OF PROPERTY—EVIDENCE—SUFFICIENCY. Upon an issue as to the character of certain property claimed by the wife as held in trust for her son, and by the husband as community property, find-

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ings in favor of the wife are warranted, where it appears that in 1871, \$1,200 came into their possession for the son from his grandfather's estate, that the property in question was conveyed to the wife in 1876, and the wife's claim that she held it in trust for the son was corroborated by evidence of the real estate agent who negotiated the sale, and of other creditable witnesses, to the effect that many years before she refused to mortgage the same for that reason, and her statements to the same effect made in the presence of witnesses were not disputed by the husband, and the property was often spoken of in the family as such individual estate. *Guye v. Plimpton*..... 234

2. **HUSBAND AND WIFE—FAMILY EXPENSES—LIABILITY OF WIFE.** Under Bal. Code, § 4508, providing that the expenses of the family are chargeable upon the property of both husband and wife, the wife is liable for hospital charges and medical attendance upon the husband during his last illness, although residing in another state at the time, where there was no positive evidence that the family relation had been severed, but on the contrary it appeared that they were in intimate communication, and after the husband's death the estate was, on petition of the wife, set aside as exempt to her for the support of herself and children. *Russell v. Graumann*..... 667
3. **HUSBAND AND WIFE—COMMUNITY REAL PROPERTY—LIABILITY FOR SURETYSHIP OBLIGATION OF HUSBAND.** The community real property is liable upon a suretyship obligation entered into by the husband alone for the benefit of the community personalty, by the giving of an appeal bond upon an appeal from a judgment against a corporation in which he had invested community property as a stockholder, although such investment was made against the protests of the wife (HADLEY and FULLERTON, JJ., dissenting). *Floding v. Denholm*.. 463

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2. **STATUTES—U. S. STATUTES REQUIRING BOND OF CONTRACTOR ON PUBLIC WORK—CONSTRUCTION—PROTECTION OF MATERIALMEN.** The act of Aug. 13, 1894, 28 Stat. 278, requiring a bond of contractors on public work, is to be liberally construed, and in the case of a contract to build and furnish light-house keepers' residences, extends to parties who supplied the contractor with furniture, although the same does not become a part of the permanent structure. *Id.*.... 87
3. **INDEMNITY—PRINCIPAL AND SURETY—EXTENSION OF TIME FOR PAYMENT—DISCHARGE OF SURETY.** A compensated surety company guaranteeing the performance of a contractor's bond is not discharged by extending the time for payment by the contractor. *Id.*..... 87
4. **SAME — TRIAL — EVIDENCE — PROOF OF INDULGENCE AND UNUSUAL CREDIT TO CONTRACTOR—ADMISSIBILITY.** An unusual indulgence and extension of time to a contractor, operating to the prejudice of a surety, cannot be shown to discharge the surety, when it is not pleaded. *Id.*..... 87

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1. **INJUNCTIONS—JURISDICTION—TO ENJOIN ELECTION ON ANNEXATION OF TERRITORY TO CITY—APPEAL—DECISION—LAW OF CASE.** Where it has been determined on appeal that the superior court had jurisdiction of a proceeding to enjoin a city election, the question is concluded and cannot be again urged upon a proceeding for a contempt in the violation of an order issued therein. *State v. Nicoll*..... 517
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 3. **INJUNCTION—PARTIES—ACTION TO ENJOIN PAYMENT OF WARRANTS.** In an action to restrain the payment of county warrants, there is a defect of parties defendant and the court has no jurisdiction of either the subject-matter or the parties, where it appears from the complaint that the warrants had been transferred to unknown holders whose presence cannot be secured. *State ex rel. Reed v. Gormley*..... 601
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2. **INSURANCE—PROOFS OF LOSS—CERTIFICATE OF MAGISTRATE NO PART—ACCRUAL OF ACTION.** Under a fire insurance policy providing that suit shall not be commenced until sixty days after the proofs of loss are furnished, and that a certificate of a magistrate that the loss was honestly sustained shall be furnished "if required," the certificate is no part of the proofs of loss, and suit commenced sixty days after furnishing proofs is not premature, although less than sixty days had elapsed since the furnishing of the certificate; and the company could not by demanding the certificate, delay the bringing of the action. *Egan v. Merchants Fire Association*..... 513

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6. JUDGMENTS—ACTION IN EQUITY TO SET ASIDE—GROUNDS. An action to vacate a judgment will not be entertained on the ground of the neglect of the attorney in failing to notify the client of the date of the trial, when it does not appear beyond a reasonable doubt that the trial court abused its discretion in refusing to vacate the judgment and grant a new trial. *Winstone v. Winstone*..... 272
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11. JUDGMENT—VACATION—ERRORS OF LAW. A judgment should not be vacated for mere errors of law after the expiration of the time for an appeal. *Snohomish Land Co. v. Blood*..... 626
12. JUDGMENT—VACATION—FRAUD OF COUNSEL—EVIDENCE—SUFFICIENCY. An attorney is not shown to be guilty of fraud in making a defense for the purchaser under a void tax lien foreclosure, by reason of failure to assert a claim for the value of improvements made after the sale, where it appears that the matter was discussed with his client and dropped because of the small value of the improvements. *Id.*..... 626

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As witness of facts at trial before him, see CRIMINAL LAW, 15.

Plea of guilty withdrawn in justice's court as evidence in superior court, see CRIMINAL LAW, 16.

JUSTIFICATION:

Of actionable words, see LIBEL AND SLANDER, 3, 4.

KNOWLEDGE:

As affecting assumption of risks by servant, see MASTER AND SERVANT, 8, 11.

Of agent imputable to principal, see HIGHWAYS, 1.

General reputation as evidence, see CRIMINAL LAW, 14.

Of incompetency of servant, see MASTER AND SERVANT 13.

LACHES:

See ESTOPPEL, 1.

Of creditor in attacking fraudulent conveyance, see FRAUDULENT CONVEYANCES, 2.

In filing objections to confirmation of sale, see MORTGAGES, 4.

As ground for dismissal, see ACTION, 3, 4.

In rescinding sale, see SALES, 5.

Of warrant holder in enforcing assessment to pay ditch warrants, see COUNTIES, 4.

LAKES:

Navigability, littoral rights, see WATERS, 1-3.

LAND COMMISSIONER:

Investment of school fund, see SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

LANDS:

See PUBLIC LANDS.

LARCENY:

Of cattle, defense, evidence of previous charges, see CRIMINAL LAW, 11-13.

LAW OF THE CASE:

See APPEAL AND ERROR, 57-59; INJUNCTION, 1.

LEGISLATIVE POWER:

Not conferred upon courts, see CONSTITUTIONAL LAW, 1.

LETTERS:

Of third person, admissibility, see CRIMINAL LAW, 9.

LIBEL AND SLANDER:

1. **LIBEL AND SLANDER—REFERENCE TO DANCE HALL—WORDS NOT ACTIONABLE PER SE—PLEADING—COMPLAINT—EVIDENCE—SUFFICIENCY.** A complaint for libel in having charged the plaintiff with conducting an entertainment in a manner that “would be a disgrace to the Comique or the worst dance hall in the city” is not sufficient in the absence of inducement or explanation as to the character of the places referred to. *Wright v. Daniel*..... 6
2. **LIBEL—DAMAGES—MENTAL SUFFERING.** Damages for mental suffering may be recovered in an action for a newspaper libel. *Ott v. Press Pub. Co.*..... 308
3. **LIBEL—DAMAGES FOR MENTAL PAIN AND SUFFERING—INSTRUCTIONS.** Error in instructing, in an action for libel, that damages cannot be recovered for mental pain and suffering, is cured where the words were actionable *per se* and the jury were instructed that it was not necessary to prove damages, but found for the defendant upon evidence sufficient to sustain the defense of the truth of the publication. *Id.*..... 308
4. **SAME—MENTAL PAIN AND SUFFERING—MITIGATING CIRCUMSTANCES—ADMISSIBILITY.** In an action for libel, where evidence is received of damages for mental pain and suffering, it is proper, under Bal. Code, § 4939, to receive evidence in mitigation of such damages. *Id.*.. 308
5. **SAME—ERRONEOUS ADMISSION OF OTHER PUBLICATIONS—APPELLANT INVITING ERROR BY INTRODUCING EVIDENCE OF ADMITTED PUBLICATIONS.** In an action for a newspaper libel of an employment agency, in which the publication was admitted, and the plaintiff nevertheless insists upon introducing the paper to show the manner in which the article was published and placed before the public, it is not error to permit the defendant to introduce other issues of the paper containing similar articles concerning other employment agencies; since the plaintiff opened the door for that class of evidence. *Id.*..... 308

LICENSES:

To practice medicine, see **CRIMINAL LAW**, 7, 8; **PHYSICIANS AND SURGEONS**, 1.

LIENS:

See **MECHANICS' LIENS**.

Agricultural liens, see **AGRICULTURE**, 1, 2.

Of judgment, expiration, see **JUDGMENT**, 1, 2.

For public improvements, see **MUNICIPAL CORPORATIONS**, 15, 16.

For purchase money, delay in asserting, see **ESTOPPEL**, 1.

Tax lien, see **TAXATION**, 3-11.

LIMITATION OF ACTIONS:

See **ADVERSE POSSESSION**; **MORTGAGES**, 5.

For collection of taxes, see **TAXATION**, 10.

LIMITATION OF ACTIONS—CONTINUED.

To enforce stockholder's liability for corporate debts, see **CORPORATIONS**, 3.

Expiration of judgment lien, see **JUDGMENT**, 1, 2.

Failure to present claim against city within time, excuse, see **MUNICIPAL CORPORATIONS**, 20, 21.

Time for taking appeal, see **APPEAL AND ERROR**, 18, 19.

1. **LIMITATION OF ACTIONS—DIVERSION OF SPECIAL FUND FOR LOCAL IMPROVEMENTS—PAYMENT OF LATER WARRANTS—ACTUAL AND CONSTRUCTIVE NOTICE—ACCRUAL OF ACTION.** The right of action against a city for the wrongful diversion of a special fund, provided for the payment of warrants, does not accrue until the holder of the warrant has actual notice of the diversion, constructive notice by the public record of payment of subsequent warrants not being sufficient to start the running of the statute (*FULLETON, J., dissenting*). *Hemen v. Ballard*..... 81
2. **LIMITATION OF ACTIONS—FOREIGN JUDGMENT.** An action upon the judgment of the state of Minnesota entered in 1903 is not barred by the statute of limitations in this state in the year 1905. *Childs v. Blethen*..... 340
3. **LIMITATIONS—FRAUD.** The statute of limitations does not begin to run against an action by the county to recover money paid upon a fraudulent road tax refund certificate until the money was refunded and the fraud discovered. *Walla Walla County v. Oregon R. & Nav. Co.*..... 398
4. **LIMITATION OF ACTIONS—ADVERSE POSSESSION—GRANTEE OF MORTGAGE HOLDING ADVERSELY TO MORTGAGEE—WHEN RIGHT ACCRUES.** Where the owner of three lots, after mortgaging one lot in 1890, sold the other two lots, pointing out the supposed boundary line as indicated by stakes, which in fact included a two and one-half foot strip of the mortgaged lot, and such strip was taken possession of and adversely held by the purchasers for a period of more than ten years, and meanwhile the mortgage was foreclosed without making the purchasers parties to the action, and the right of action for the foreclosure of the mortgage was subsequently barred by lapse of time as to the purchasers in possession of the strip, their title to the strip by virtue of adverse possession is complete; since the statute begins to run as against the mortgagors and their successors at the date of the taking of possession, and is complete in ten years, and as against the mortgagee and his successors in interest, it begins to run at the date the mortgage is due (no payments being made) and is complete in six years. *Thornley v. Andrews*..... 580

LIMITATION OF LIABILITY:

Of carrier of livestock, see **CARRIERS**, 4-10.

LITTORAL RIGHTS:

See **WATERS**, 1-3.

LIVERY STABLE KEEPERS:

Sale of livery stable not within bulk stock law, see **FRAUDULENT CONVEYANCES**, 3.

LIVE STOCK:

Carriage of, delivery, see **CARRIERS**, 4-10.

LOCATION:

Of boomage sites, see **LOGS AND LOGGING**.

LOGS AND LOGGING:

Cutting timber, see **CONTRACTS**, 1.

Obstruction of stream, see **WATERS**, 4-8.

1. **LOGS AND LOGGING — BOOMAGE CORPORATIONS — LOCATION — PREFERENCE RIGHTS—FUTURE NEEDS OF PUBLIC.** A boom company being, under the statute of this state, a public service corporation, has a preference right to construct a boom within its located territory, in analogy to the rights of a railroad company conferred by its selection of a route, and it has the right to anticipate the future needs of service for the public. *Nicomien Boom Co. v. North Shore etc. Co.*..... 315
2. **SAME—NON-USER OF PART OF LOCATION—NEEDS OF PUBLIC—EXTENSION OF BOOM—DILIGENCE.** Nonuser of a portion of a boom company's location, duly appropriated by the filing of a plat and survey, does not constitute an abandonment of that part, when the needs of the public did not then require it, and it had constructed such portion of its works as were required by existing demands, and there was no lack of diligence to construct an extension of the boom over the portion not used. *Id.*..... 315
3. **SAME—DILIGENCE—EVIDENCE—SUFFICIENCY.** A finding that there is no lack of diligence by a boom company in making use of its location is sustained, where it had always intended to make an extension when required, had spent \$16,000 on its primary location, which met present demands, and was proceeding to make an extension. *Id.*.. 315
4. **SAME—NON-USER—REVERSION OF CONDEMNED LANDS WHEN USE CEASES—LANDS NOT YET USED.** Bal. Code, § 4378, providing that if the use of lands condemned for booming purposes shall cease for one year, they shall revert to the owner, applies only to lands condemned, and does not apply to lands located with reference to future needs the necessity for the use of which has not arisen. *Id.*..... 315
5. **SAME—MONOPOLY OF STREAM—GOOD FAITH OF LOCATOR—NECESSARY CONTROL OF STREAM.** The argument against a monopoly does not preclude a boom company from so locating its site as to control the booming on a certain river, if the available booming extent is such as to reasonably prevent the operation of more than one boom. *Id.*..... 315

MAIL:

Service of process by, see **PROCESS**, 1.

MANDAMUS:

See **APPEAL AND ERROR**, 3, 5.

To county commissioners to compel establishment of ditch fund, see **COUNTIES**, 1-5.

1. **MANDAMUS — APPEAL — SUPERSEDEAS — DESTRUCTION OF PROPERTY PENDING HEARING.** Upon an appeal from an order dissolving an injunction against the threatened destruction of buildings, a writ of mandate to compel the lower court to fix the amount of the bond will be denied where the property was destroyed before the hearing. *State ex rel. Wheeler v. Irwin*..... 413
2. **MANDAMUS—WHEN LIES—SECRETARY OF STATE—ILLEGAL ARTICLES OF INCORPORATION—FILING.** The duties of the secretary of state are not ministerial to the extent of requiring him to file improper articles of incorporation and refer the matter to the attorney general for action; nor would the courts require the doing of a vain or illegal act. *State ex rel. Gorman v. Nichols*..... 437
3. **MANDAMUS—TO PREVENT CHANGE OF VENUE—ADEQUACY OF REMEDY BY APPEAL.** If a court has exclusive jurisdiction of a cause without power to order a change of venue, mandamus is the proper remedy to compel it to proceed with the trial after improperly granting a change of venue, the remedy by appeal not being adequate. *State ex rel. Wyman, Partridge & Co. v. Superior Court*..... 443

MARRIAGE:

See **DIVORCE**.

MARRIED WOMEN:

See **HUSBAND AND WIFE**.

MASTER AND SERVANT:

Personal injuries, see **TRIAL**, 2.

1. **MASTER AND SERVANT—RAILROADS—OBSTRUCTION NEAR TRACK—UNNECESSARILY RIDING ON SIDE OF CAR—WIDTH OF BRIDGE—DUTY OF COMPANY.** A railroad company is not liable to a brakeman, struck by a projecting bolt while riding on the side of a car when the train was passing through a bridge between stations, the proper discharge of his duties in cutting off the air from the brakes 1,600 feet or more distant from the bridge not requiring him to ride on the side of the car at that place, and the rules of the company requiring him to note the position of bridges. *Krebbs v. Oregon R. & Nav. Co.*..... 138
2. **MASTER AND SERVANT—INJURY TO SECTION HAND RIDING ON PUSH CAR ATTACHED TO TRAIN — NEGLIGENCE OF COMPANY — QUESTION FOR JURY.** The use by a railroad company of a push car attached to a

MASTER AND SERVANT—CONTINUED.

- train by a rope, for the purpose of transporting its section crew, cannot be said, as a matter of law, to be the exercise of the care required on the part of the company in that regard, but the question is for the jury. *De Mase v. Oregon R. & Nav. Co.*..... 108
3. MASTER AND SERVANT—NEGLIGENCE—INJURY TO EMPLOYEE IN ROLLER CRUSHER—STARTING MACHINERY WITHOUT WARNING—VERDICT ON CONFLICTING EVIDENCE—REVIEW. A verdict of a jury upon the question of the negligence of the defendant and the contributory negligence of the plaintiff, in a personal injury case, will not be disturbed where it appears that the plaintiff was injured in a roller crusher by the starting of machinery which he was oiling, by reason of the fact that no warning was given, and there was conflicting evidence upon the question as to whether the customary warning was given. *Westby v. Washington Brick etc. Co.*..... 289
4. MASTER AND SERVANT—NEGLIGENCE—INJURY TO SEAMAN—DUTY TO WARN OF CHANGE OF COURSE OF SHIP—QUESTION FOR JURY. In an action for personal injuries sustained by a seaman in the navigation of a ship at sea the question of the negligence of the defendant is for the jury, where there was conflicting evidence as to whether it was the duty of the master of the ship to give the seaman warning of an order for the change of course of the ship whereby, as claimed, the seaman might have protected himself from injury. *Woods v. Globe Navigation Co.*..... 376
5. MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANTS. No question of fellow servant is involved where an inexperienced man is injured through a failure to instruct and warn him, while obeying the order of the operator from whom he was instructed to take orders. *Jancko v. West Coast Mfg. etc. Co.*..... 230
6. MASTER AND SERVANT—NEGLIGENCE—VICE PRINCIPAL AND FELLOW SERVANTS—SAWYER IN CONTROL OF CREW—SAFE PLACE—DUTY TO WARN OF DANGER RENDERING PLACE UNSAFE. A sawyer in control of a saw crew is a vice principal with reference to the duty to warn one of his crew, a log deck man, as to the danger arising from the operation of the machinery, where it appears that the log deck man was in plain view of the sawyer near a nigger slot with no means of knowing that the place was about to be rendered dangerous by the operation of the nigger, a powerful machine operated by steam for the purpose of pushing heavy logs on to the saw carriage; as it is an imperative duty of the master in furnishing a safe place to give warning of the act of a superior servant in control of machinery which would injure an inferior servant without opportunity on his part of self protection or escape. *Dossett v. St. Paul etc. Lum. Co.*..... 276
7. MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANTS—MASTER OF SHIP AND SEAMAN. The master of a ship is not a fellow servant with

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- an ordinary seaman obeying his orders in the work of navigating the ship. *Woods v. Globe Navigation Co.*..... 376
8. SAME—LIABILITY OF PUSH CAR TO LEAVE TRACK—ASSUMPTION OF RISK—KNOWLEDGE OF SECTION HAND. A section hand riding for the first time on a push car attached to a train does not necessarily assume the risk of the car's leaving the track, and does not stand on equal footing with the foreman as to knowledge of the danger, and the question whether he assumed the risks is for the jury. *De Mase v. Oregon R. & Nav. Co.*..... 108
9. SAME—CONTRIBUTORY NEGLIGENCE—TWO METHODS OF DOING WORK—SAFE PLACE—RENDERED UNSAFE BY ACT OF VICE PRINCIPAL. A servant cannot be said to be guilty of contributory negligence as a matter of law in electing to place himself over a nigger slot in a log deck in a sawmill, when he might have gone around the slot, where it was safe to place himself over the slot when the nigger was not in operation, and the place would become unsafe only by the action of the sawyer in operating the machinery. *Dossett v. St. Paul etc. Lum. Co.*..... 276
10. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The question of the contributory negligence of a servant, employed as a log deck man in a mill, and injured by the act of the sawyer in putting the machinery in operation while he was in a dangerous position, near or about to reach over a nigger slot in the discharge of his duties, is for the jury, where the evidence was conflicting as to whether he was at the time necessarily in such a position in the proper discharge of his duties. *Id.*..... 276
11. MASTER AND SERVANT—NEGLIGENCE—INJURY TO SERVANT PILING LUMBER—CONTRIBUTORY NEGLIGENCE—FELLOW SERVANTS—NONSUIT. An employee who is injured by the falling of lumber piled by himself and by two fellow servants, is guilty of contributory negligence and assumes the risk, where it appears that he was experienced and was as capable of realizing the danger as the foreman, who had nothing to do with piling the lumber further than to direct the plaintiff where to do his work. *Denny v. Kleebe.*..... 634
12. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE. There is sufficient evidence that an injury to an inexperienced employee, sustained in attempting to remove a slab from a saw, was due to the vibration of the saw when he so testifies, and is corroborated by expert testimony of a substantial vibration by a saw so placed and operated. *Jancko v. West Coast Mfg. etc. Co.*..... 230
13. SAME—INCOMPETENCY OF FELLOW SERVANT—EVIDENCE OF NEGLIGENCE ON PRIOR OCCASION—ADMISSIBILITY. In an action for personal injuries sustained through the negligence of a coservant alleged to be a vice principal, and habitually negligent and careless, evidence is admissible of a specific act of incompetence upon the part of such

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- coservant, at which time he had injured one of his men and which was generally discussed about the mill, and also that he was cross and irritable toward the men under him. *Dossett v. St. Paul etc. Lum. Co.*..... 276
14. SAME—EVIDENCE—EXPERT WITNESS—DUTIES OF SAWYERS—CUSTOM IN OTHER MILLS—ADMISSIBILITY. In an action for personal injuries sustained by an employee upon a log deck of a mill, through the act of the sawyer in operating the machinery while the plaintiff was reaching over the nigger slot, it is admissible for expert sawyers to testify as to the duty of the sawyer under such circumstances, and to state the custom and rules adopted in other mills of the same kind and capacity. *Id.*..... 276
15. MASTER AND SERVANT—WHEN RELATION EXISTS—MUNICIPAL CORPORATION AND INDEPENDENT CONTRACTOR—PERSONAL INJURIES TO EMPLOYEE OF CONTRACTOR ON STREET WORK—NEGLIGENCE OF CITY ENGINEER—POWER TO SUPERINTEND WORK AND DISCHARGE MEN. A contractor for the construction of a cement sidewalk, having full control of the manner of doing the work and the selection of his men and materials, is an independent contractor, although his contract provides that the improvement shall be under the superintendence of the city engineer, whose directions shall be obeyed, that orders shall be given to the contractor or his superintendent having immediate charge, and that incompetent men shall be discharged on his requisition; and the city is therefore not liable to an employee of the contractor, a laborer in a gravel pit, for injuries sustained through obeying an order of the city engineer to work in a dangerous place; since the contract gave the engineer no right to direct individual employees, and the power of superintendence does not affect the relation of an independent contractor. *Engler v. Seattle.*.... 72
16. MASTER AND SERVANT—INDEPENDENT CONTRACTOR—NEGLIGENCE—LIABILITY OF ORIGINAL CONTRACTOR TO SERVANTS OF SUBCONTRACTOR. Subcontractors for the erection of a structure under a written contract whereby they have sole charge of the erection work, entirely controlled its method, and employed the men, are independent contractors, and the original contractor is not liable to those engaged upon the work for personal injuries due to the neglect of the subcontractors, since the relation of master and servant does not exist; and the retention of the right to supervise the work for the purpose of merely determining whether it is done according to the contract does not affect the independence of the relation. *Larson v. American Bridge Co.*..... 224

MATERIALMEN:

Protection on public work, see INDEMNITY, 1, 2.

MECHANICS' LIENS:

Laborer's lien on farm products, see AGRICULTURE.

1. **MECHANICS' LIENS—BUILDING MATERIALS—FORECLOSURE—PARTIES.** Where a contractor was doing business under the name of "Western Mill Factory," a contract made with him in such name shows that he is the real party in interest entitled to enforce a mechanics' lien therefor. *Littell v. Saulsberry*..... 550
2. **MECHANICS' LIENS—ATTORNEY'S FEES—CONSTITUTIONALITY.** Bal Code, § 5811, authorizing an attorney's fee in favor of the plaintiff in an action to foreclose a mechanics' lien, is not unconstitutional. *Id.*..... 550
3. **MECHANICS' LIENS—ATTORNEY'S FEES—AMOUNT.** Where the only contest in an action to foreclose a mechanics' lien was over the sum of \$73.63, demanded for extras, the allowance of \$100 for attorney's fees is exorbitant, and should be reduced to \$50, in the absence of satisfactory evidence in the record as to what a reasonable fee would be. *Id.*..... 550
4. **SAME—EVIDENCE.** Upon an issue as to the reasonable value of an attorney's fee for the foreclosure of a mechanics' lien, cross-examination as to the amount involved in the case is proper. *Id.*..... 550

MENTAL SUFFERING:

Damages, see LIBEL AND SLANDER, 2-4.

As element of damages for breach of warranty, see SALES, 3.

MERITORIOUS DEFENSE:

Necessity of for vacation of default, see JUDGMENT, 8.

MINES AND MINERALS:

Agreement to prospect, breach, see CONTRACTS, 8.

Contract to locate claims, see ACCOUNT, 2.

MINORS:

Certification to superior court of conviction in justice's court, see CRIMINAL LAW, 23, 24.

MISCONDUCT:

Of counsel, see TRIAL, 2.

MISDEMEANOR:

See CRIMINAL LAW, 2.

MISREPRESENTATION:

See FRAUD.

Inducing sale, see SALES, 1-6.

As ground for reforming deed, see REFORMATION OF INSTITUTIONS, 1.

Affecting transactions between attorney and client, see ATTORNEY AND CLIENT, 1.

MISTAKE:

Ground for reformation of instrument, see REFORMATION OF INSTRUMENTS, 1.

MITIGATION:

Of libel, see LIBEL AND SLANDER, 4.

MODIFICATION:

Of contract, see CONTRACTS, 7.

Of decree of divorce, see DIVORCE, 1, 2.

MONOPOLIES:

Boom location not a monopoly, see LOGS AND LOGGING, 5.

MORTGAGES:

Inconsistent descriptions, construction, see DEEDS, 1, 2.

Statute of limitations, see LIMITATION OF ACTIONS, 4.

1. MORTGAGES—FORECLOSURE—ACTION TO SET ASIDE SALE—EVIDENCE AS TO DATE—SUFFICIENCY. A decree of foreclosure should not be set aside, after seven years has intervened, on slight testimony that the sale was advertised for a certain day, and in fact took place on the following day; and findings sustaining the sale will not be disturbed where the testimony was not conclusive either way. *Terry v. Furth*..... 493
2. SAME—IRREGULARITIES—CONFIRMATION OF SALE—FAILURE TO OBJECT. The confirmation of a sale of real estate is conclusive as to the regularity of the sale, upon an action to set aside the confirmation for irregularities. *Terry v. Furth*..... 493
3. MORTGAGES—JUDICIAL SALE—SETTING ASIDE—FRAUD—SUFFICIENCY OF SHOWING. An action to set aside the confirmation of a sale of real estate for fraud cannot be sustained where the fraud shown was connected with the execution of the mortgage, and the only objection to the sale is that it was not had on the day advertised, and there is no claim of fraud in connection with the date of the sale. *Id.*.... 493
4. SAME—LACHES OF OWNER—EXCUSE FOR DELAY. Removal from the state previous to a sale of real estate under a decree of foreclosure is not a sufficient excuse for failure to file objections to the confirmation of the sale within the time required by law. *Id.*..... 493
5. MORTGAGES—SATISFACTION—CONVEYANCE TO MORTGAGEE—DEED ABSOLUTE ON FAILURE TO REDEEM—CONTRACT FOR REDEMPTION—CONSTRUCTION—EVIDENCE. A deed absolute in form in consideration of the amount due to the grantee upon a mortgage past due, should not be considered as a mortgage, although a contract made at the same time gives the grantor one year in which to redeem from the debt, and provides that the mortgage is to be kept alive, where the note and mortgage were surrendered to the maker, and the land was taken possession of by the grantees, who paid the taxes, made im-

MORTGAGES—CONTINUED.

provements and treated it as their own, and where the grantor abandoned the same and made no offer to pay the debt, or any claim to the property for seven years, when action for the debt was barred by the statute of limitations. *Hesser v. Brown*..... 688

MOTIONS:

Certainty of complaint, see **TAXATION**, 9.
 Change of venue in criminal prosecution, see **CRIMINAL LAW**, 32, 33.
 Dismissal of appeal, striking statement of facts, see **APPEAL AND ERROR**, 13-17, 36-43.
 Dismissal or nonsuit on trial, see **TRIAL**, 1.
 New trial in civil actions, see **NEW TRIAL**, 1-3.
 Opening or vacating judgment, see **JUDGMENT**.

MULTIPLICITY OF SUITS:

Restraining enforcement of assessment liens, joinder of plaintiffs, see **MUNICIPAL CORPORATIONS**, 16.

MUNICIPAL CORPORATIONS:

- See **CONTEMPT**, 4; **COUNTIES**.
 Dismissal of appeals in condemnation proceedings, costs, see **APPEAL AND ERROR**, 38, 39.
 Contractor constructing sidewalk as independent contractor, see **MASTER AND SERVANT**, 15.
 Injunctions affecting, see **INJUNCTION**, 1-3.
 Local improvements, see **CONSTITUTIONAL LAW**, 1.
 Mandamus to compel payment of costs, see **APPEAL AND ERROR**, 5.
 Municipal bonds, what are, see **SCHOOLS AND SCHOOL DISTRICTS**, 2.
 Special assessment, review, fruits of appeal, costs, see **APPEAL AND ERROR**, 61, 62.
 Streets, right to, limitations, see **ADVERSE POSSESSION**, 1.
 Tax liens, see **TAXATION**, 10.
 Wrongful diversion of special fund, see **LIMITATION OF ACTIONS**, 1.
1. **MUNICIPAL CORPORATIONS—MAINTENANCE OF FIRE DEPARTMENT—GOVERNMENTAL FUNCTION—NEGLIGENCE OF EMPLOYEES—INJURIES RESULTING FROM TRESPASSING BY HORSE USED IN FIRE DEPARTMENT—NON-LIABILITY.** A city is not liable for damages caused by a horse used in its fire department, which was permitted to trespass upon plaintiff's lawn through the negligence of the firemen, since the maintenance of its fire department is the exercise of a governmental function (*RUDKIN and FULLERTON, JJ.*, dissenting). *Cunningham v. Seattle*..... 59
 2. **MUNICIPAL CORPORATIONS—OFFICERS—ENJOINED FROM HOLDING SPECIAL ELECTION—ELECTION ALREADY CALLED.** Where a restraining order has been served upon the city officers, enjoining the holding of an election, it is their duty to stop the election, and they cannot

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- avoid punishment for contempt by showing that the election had already been called and the election officers appointed. *State v. Nicoll*..... 517
3. SAME—COURTS—JURISDICTION—GRANTING INJUNCTION WITHOUT NOTICE ON THE DAY BEFORE ELECTION—PROPRIETY—DISCRETION. While the propriety of enjoining a municipal election upon the eve of the election, without giving notice of the application, is questionable, the matter is within the discretion of the trial court, and objection thereto does not go to the jurisdiction of the court to make the order. *Id.*..... 517
4. MUNICIPAL CORPORATIONS—CONTRACTS—VALIDITY—AUTHORITY OF OFFICERS TO EXECUTE—MODE OF EXECUTION PRESCRIBED BY ORDINANCE—RATIFICATION OF INVALID IMPLIED CONTRACT. Under Seattle city charter, art. 4, § 27, providing that no debt or obligation shall be created except by ordinance, and § 28, providing that no officer shall have power to ratify any invalid claim, a contract for commissions for effecting a sale of municipal bonds, made by the city comptroller and the finance committee of the city council, is unenforceable; and the fact that the city had accepted the benefits of the services cannot amount to a ratification. *Paul v. Seattle*..... 294
5. SAME—CUSTOM—NONCOMPLIANCE WITH REQUIREMENTS. The custom of a city to vest its financial control and management in its comptroller and chairman of the finance committee and to adopt the practice and custom of entering into contracts through such officers without strict compliance with the requirements of the charter, cannot bind the city on a contract not executed or authorized in the manner provided in the charter. *Id.*..... 294
6. SAME—RATIFICATION OF IMPLIED CONTRACT—TO BE BY ORDINANCE. A municipal contract not made in compliance with the requirements of the provisions of the charter requiring it to be by ordinance cannot be ratified except by ordinance. *Id.*..... 294
7. SAME—RECEIPT OF BENEFITS—ESTOPPEL. Where a municipal contract is not executed in the manner required by charter, no estoppel arises against the city by reason of the fact that the contract had been fully executed and the city has received the benefits thereof. *Id.*..... 294
8. MUNICIPAL CORPORATIONS—SPECIAL FUND FOR LOCAL IMPROVEMENT—WRONGFUL DIVERSION BY CITY—WARRANTS—PAYMENT OUT OF ORDER OF PRIORITY. A city renders itself liable to the holder of special fund street improvement warrants by paying subsequent warrants out of the order of their priority, where the fund was insufficient in amount to pay all the warrants issued against it, and nothing was left to pay the prior warrants. *Hemen v. Ballard*..... 81
9. SAME—IMPROVEMENTS AT CROSSING ASSESSABLE TO CITY—SAME A PART OF SPECIAL ASSESSMENT FUND. Under Bal. Code, § 943, making

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the city liable for the cost of street improvements at street intersections and crossings, such cost, where an entire contract is made for the whole improvement, is to be paid by the city into the special fund for the benefit of special fund warrants to be paid in the order of their priority, and the payment of the city's share of the cost, by its general fund or street fund warrants out of their order, is a wrongful diversion, operating to the prejudice of the holders of special fund warrants, where the special assessment including the city's share is insufficient to pay the entire cost of the improvement.

Id...... 81

10. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—WHAT LAW GOVERNS—PROPERTY SPECIALLY BENEFITED—CONTIGUITY. Where a proceeding to levy special assessments for a local improvement was commenced under an act restricting the levy to contiguous property, and a supplemental petition was filed after the law was changed eliminating the word "contiguous," the new law controls the proceeding, and the levy is not restricted to contiguous property. *In re Westlake Avenue*..... 144
11. SAME—LUMP ASSESSMENT AGAINST PORTIONS OF LOT DIVIDED BY ESTABLISHMENT OF NEW AVENUE—SEPARATE ASSESSMENT ESSENTIAL. A "lump" assessment cannot be levied upon separate portions of a lot where the parcels are separated by the new street for which the assessment is made. *Id.*..... 144
12. SAME—ASCERTAINMENT OF BENEFITS—MATTERS TO BE CONSIDERED—SPECIAL USES—NATURAL AND REASONABLE RESULTS. In levying a special assessment the commissioners must take into consideration any special use being made of the property, or for which it was adapted, or with reasonable probability would become so in the future, as determined by natural and reasonable results, rather than fanciful anticipations. *Id.*..... 144
13. SAME—APPORTIONMENT BETWEEN CITY AND DISTRICT SPECIALLY BENEFITED—DISCRETION OF COMMISSIONERS—ACTION CONCLUSIVE. In apportioning the amount to be borne respectively by the city as a whole, and by the benefited property, the action of the commissioners is conclusive on the courts, in the absence of fraud, mistake of fact or law, or arbitrary action amounting to an abuse of discretion. *Id.*..... 144
14. SAME—SIZE OF ASSESSMENT DISTRICT—ASSESSMENT OF PROPERTY BENEFITED OUTSIDE OF DISTRICT—DUTY OF COMMISSIONERS—DISTRICT CREATED BY ORDINANCE—STATUTES—CONSTRUCTION. The commissioners are to determine the size of, and assess all benefited property within the assessment district, and cannot be restricted to the limits of the assessment district specified by the city council. *Id.*..... 144
15. MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS—FORECLOSURE—DEFENSES—TENDER OF AMOUNT DUE. In an action to restrain the

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- foreclosure of a special assessment lien, in which the complaint alleges a tender of the amount due, the complaint states a cause upon which an unconditional judgment may be rendered, although it is not shown that the tender was kept good by bringing the money due into court, in the absence of a demand therefor at the time of entry of judgment or any request for a conditional judgment. *Coleman v. Rathbun*..... 303
16. SAME—ACTIONS—PARTIES PLAINTIFF—JOINDER—EQUITY—MULTIPLICITY OF SUITS. In order to avoid a multiplicity of suits, an action in equity against a municipality to restrain the enforcement of liens may be brought jointly by many plaintiffs owning separate parcels, but who are similarly affected by the threatened wrong. *Id.*.... 303
17. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE—INJURY TO DRIVER OF TEAM THROUGH OBSTRUCTION IN STREET UNDERGOING REPAIRS—TEAM BEYOND CONTROL—VERDICT CONCLUSIVE ON QUESTION OF FACT. There is sufficient evidence to sustain a verdict for the driver of a team, whose horses got beyond his control in coming down a steep grade, and who was thrown from his wagon by obstructions at the street intersection, where it appears that the city, in repairing the intersecting street at the foot of the grade, left a sudden depression, and further obstructed the same with wide planks on each side of street car tracks, without closing the approach to the street, or giving notice of the danger; and the verdict is conclusive on the question of fact. *Peterson v. Seattle*..... 33
18. SAME—DUTY OF CITY. Where a city is improving a street and fails to close it for public travel, it owes the same duty to keep it in a reasonably safe condition as in the case of other streets, in view of the work going on and all the circumstances, and to use reasonable precautions to guard the public from injury. *Id.*..... 33
19. SAME—ACCIDENTS IN CASE OF RUNAWAY TEAM—OBSTRUCTIONS PROXIMATE CAUSE—INSTRUCTIONS. In an action for injuries sustained through an obstruction in a street by the driver of a team that was running away, it is not error to refuse an instruction to the effect that the city is not bound to anticipate accidents from, or make its streets safe for, runaway teams, where the instruction was not qualified by a statement that the city would be liable if the proximate cause of the accident was the unsafe condition of the street, without negligence on the part of the plaintiff, and where other instructions properly stated the law on the subject. *Id.*..... 33
20. MUNICIPAL CORPORATIONS—ACTIONS—PRESENTATION OF CLAIM WITHIN THIRTY DAYS—EXCUSE FOR DELAY—INCAPACITY. A person is not excused from presenting to the city his claim for personal injuries within thirty days as required by the charter, where it appears that his injury was a compound fracture of the humerus, that he was capable of going about within sixteen days after the accident,

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- and was mentally capable of attending to some business, and his mind was not so affected but that he could have employed a lawyer to present his claim. *Ehrhardt v. Seattle*..... 221
21. SAME—ATTEMPT TO PRESENT AFTER OFFICE HOURS. An attempt to present a claim on the last day allowed, which failed because the offices of the city were closed between the hours of 5 and 6 p. m., is no excuse for failing to present it in time, when the charter provides that the offices shall be open until 5 p. m. *Id.*..... 221
22. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—CLAIM AND NOTICE OF INJURY—DEFINITENESS AS TO PLACE—SUFFICIENCY. A notice of claim for injuries, sustained upon a city sidewalk, which describes the place as on the east side of J street between 41st and 42d streets, is a sufficient compliance with a charter requirement that it shall describe the place, although the accident occurred between 41st and 43d streets, there being no 42d street intersecting J street; since there was evident a *bona fide* effort to comply with the law and no intention to mislead, and a description sufficient to identify the place and enable one to find it. *Hammock v. Tacoma*..... 539
23. SAME—PLEADING—COMPLAINT—MISTAKE AS TO DATE OF PRESENTATION OF CLAIM—AMENDMENT UPON REVERSAL. Where a demurrer to a complaint against a city for personal injuries was interposed on the ground that the notice of claim did not sufficiently identify the place, and was at variance with the complaint, a claim cannot be first made in the supreme court that the notice appears by its date to have been filed one day too late, where the plaintiff claims the date to be a clerical error, and especially where the complaint alleges that it was filed within time. *Id.*..... 539
24. HEALTH—FIRE ESCAPES—MUNICIPAL REGULATION—APPLICATION TO BUILDINGS ALREADY CONSTRUCTED—STATUTES—RETROSPECTIVE EFFECT—CONSTRUCTION. A municipal ordinance requiring all buildings of a certain description within the fire limits to be supplied with certain described appurtenances as fire escapes, is intended to be retroactive and applies to all buildings, including those duly equipped with other fire escapes under former ordinances, especially in view of a clause making not only the construction or alteration of a building without fire escapes, but the violation of "any provision" of the act, punishable by fine. *Seattle v. Hinckley*..... 468
25. SAME—POLICE POWER—VIOLATION OF MUNICIPAL REGULATIONS—VESTED RIGHTS IN COMPLIANCE WITH EXISTING REGULATION. A municipal ordinance requiring fire escapes upon buildings of a certain description within prescribed limits, is within the police power, and impairs no vested rights by reason of applying to buildings erected in compliance with a previous ordinance requiring a different kind of fire escapes. *Id.*..... 468

MUTUAL BENEFIT SOCIETIES:

See BENEFICIAL ASSOCIATIONS.

NAVIGABLE WATERS:

See WATERS.

Obstruction as justification for trespass to remove boom, see WATERS, 6.

NECESSITY:

Sufficient to justify condemnation, see EMINENT DOMAIN, 1, 2.

For compelling the supply of power to street railroad, see SPECIFIC PERFORMANCE, 1, 2.

NEGLIGENCE:

See CARRIER, 1-3.

Of attorney as ground for vacation and new trial, see NEW TRIAL, 2.

Of city in care of streets, see MUNICIPAL CORPORATIONS, 17, 18.

Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 10.

Employers and employees, see APPEAL AND ERROR, 53, 54; MASTER AND SERVANT.

Of employees of fire department, liability of city, see MUNICIPAL CORPORATIONS.

Fires caused by operation of railroad, see RAILROADS, 2-5.

Of independent contractor, see MASTER AND SERVANT, 15, 16.

In maintenance of railroad tracks, see APPEAL AND ERROR, 45; RAILROADS, 1.

Violation of duty to unload livestock, see CARRIERS, 5, 6, 10.

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEWSPAPERS:

Libel, see LIBEL AND SLANDER.

NEW TRIAL:

Review, see APPEAL AND ERROR, 46.

Denial as fixing time for appeal, see APPEAL AND ERROR, 18.

Effect of vacation of judgment, see APPEAL AND ERROR, 9.

Opening or vacating judgment, see JUDGMENT, 5-12.

1. NEW TRIAL—TIME FOR FILING APPLICATION—COMPUTATION—HOLIDAYS EXCLUDED. Under Bal. Code, § 5075, requiring a motion for a new trial to be filed within two days, and § 4790, excluding holidays, a motion for a new trial is in time if made on the fourth day, where two consecutive legal holidays intervene. *Kubillus v. Ewert*.... 38
2. NEW TRIAL—DENIAL—FAILURE TO APPEAL FROM ORDER—ESTOPPEL IN SUBSEQUENT PROCEEDING. Where a motion for a new trial on the ground of the neglect of the attorney was presented by new attorneys,

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and denied, and no appeal was taken, it is proper to dismiss an action to vacate the judgment, based on the same grounds presented in the motion for a new trial. *Winstone v. Winstone*..... 272

3. **NEW TRIAL—SURPRISE—DILIGENCE.** A new trial on the grounds of surprise from the absence of a witness or from unexpected testimony will be denied unless the claim is promptly made and a continuance asked. *Woods v. Globe Navigation Co.*..... 376

NONUSER:

As abandonment of boom location, see **LOGS AND LOGGING**, 2, 4.

NOTES:

Promissory notes, see **BILLS AND NOTES**.

NOTICE:

Of appeal, see **APPEAL AND ERROR**, 18, 23, 38.

Of action or process, see **PROCESS**, 1-4.

Of application for injunction, see **MUNICIPAL CORPORATIONS**, 3.

Application to open default, see **JUDGMENT**, 9.

To creditors of ownership of property, see **TROVER AND CONVERSION**, 1.

Of danger of street in repair, see **MUNICIPAL CORPORATIONS**, 17, 18.

Claim for injuries from defective sidewalk, see **MUNICIPAL CORPORATIONS**, 20-23.

Of deed records, constructive, see **DEEDS**, 1, 2.

Of incompetency of servant, see **MASTER AND SERVANT**, 13.

Injury to live stock by carrier, see **CARRIERS**, 8, 9.

Of litigation as estoppel, see **ESTOPPEL**, 1.

Of laborer's lien, amendment, see **AGRICULTURE**, 1, 2.

Probate proceedings, see **WILLS**, 4.

Of settlement or filing statement of facts, see **APPEAL AND ERROR**, 24, 30.

Of sale of stock of goods in bulk, see **FRAUDULENT CONVEYANCES**, 2.

Of tax foreclosure, see **TAXATION**, 4.

Of wrongful diversion of special fund, see **LIMITATION OF ACTIONS**, 1.

NUISANCE:

Obstruction of stream, see **WATERS**, 4-8.

NUNCUPATIVE WILLS:

See **WILLS**, 1-6.

OBJECTIONS:

Necessity for purpose of review, see **APPEAL AND ERROR**, 12-17, 41, 46, 58.

To confirmation of sale, failure to file, see **MORTGAGES**, 4.

To tax foreclosure, see **TAXATION**, 7, 8.

To pleadings, raising at trial, see **PLEADING**, 1.

To validity of tax, see **TAXATION**, 2.

OBSTRUCTIONS:

In street, see MUNICIPAL CORPORATIONS, 17-19.
Of water course, see WATERS, 4-8.

OFFER:

Proposals for contract, see CONTRACTS, 2.

OFFICERS:

County commissioners, see COUNTIES.
Duty when enjoined from holding election, see MUNICIPAL CORPORATIONS, 2, 3.
Injunctions affecting, see INJUNCTION, 1-3.
Liability for negligence in performing governmental functions, see MUNICIPAL CORPORATIONS, 1.
Mandamus affecting, see MANDAMUS, 2.
School superintendent, new school districts, county commissioners, see SCHOOLS AND SCHOOL DISTRICTS, 3-5.

ORDERS:

Review, see APPEAL AND ERROR.
Of dismissal, see JUDGMENT, 4.
Of sale, see JUDGMENT, 1, 2.
Disobedience of as contempt, see CONTEMPT, 1-6.

OWNERSHIP:

As determining duty to maintain safety of tracks, see RAILROADS, 1.

PARENT AND CHILD:

Custody of children on divorce, see DIVORCE, 1, 2.

PAROL AGREEMENTS:

Modifying written contract, see CONTRACTS, 7.
Oral statements varying writing, see CONTRACTS, 4.

PARTIES:

See ASSIGNMENTS, 1; HIGHWAYS, 2.
Joinder, see CONTEMPT, 3, 4.
County when proper party, see COUNTIES, 2.
Foreclosure of lien, see MECHANICS' LIENS, 1.
To cancellation of deeds for fraud, see VENDOR AND PURCHASER, 2.
To tax foreclosure proceeding, see TAXATION, 7, 8.
In action on judgment against stockholders of insolvent corporation, see CORPORATIONS, 2, 5, 6.
Who may sue on bond, see INDEMNITY, 1.
Persons concluded by order in receivership, see JUDGMENT, 13.
Persons entitled to claim by prescription, see ADVERSE POSSESSION, 1.
Persons entitled to enforce specific performance of contract, see SPECIFIC PERFORMANCE, 2.

PARTIES—CONTINUED.

Restraining enforcement of municipal assessments, see **MUNICIPAL CORPORATIONS**, 16.

Restraining payment of warrants, holders unknown, see **INJUNCTION**, 3.

Substitution of executor in action to vacate divorce, see **DIVORCE**, 3, 4.

PARTNERSHIP:

1. **PARTNERSHIP—CONTRACTS—AUTHORITY OF CO-PARTNER TO EXECUTE—EVIDENCE—SUFFICIENCY.** Evidence that one partner was not satisfied with a contract of sale, is not evidence of want of authority of his copartner to make it, there being no evidence that the price was inadequate. *Kubillus v. Ewert*..... 38
2. **PARTNERSHIP—ACCOUNTING AND DISSOLUTION—FAILURE OF PARTNER TO ACCOUNT—FINDINGS AS TO SOLE MANAGEMENT—EVIDENCE—SUFFICIENCY.** In an action to dissolve a partnership in the butchering business for failure of the defendant to account, a finding that defendant had sole management of the business is sustained by evidence that he, only, had experience in the business, ran the meat market, took in and paid out all the money, and the plaintiff was assigned to the stock and butchering grounds where the employees ignored him and followed the directions of the defendant. *Escallier v. Baines*..... 176
3. **SAME—DUTY TO KEEP ACCOUNTS—FINDINGS—IMMATERIALITY.** In an action to dissolve a partnership, it is immaterial whether there is support for a finding that the defendant was the only member of the firm capable of keeping books, where it appeared that it was his duty to keep them. *Id.*..... 176
4. **SAME—WILFUL MISCONDUCT OF PARTNER—LOSS OF ASSETS—FAILURE TO ACCOUNT FOR LOSS—GENERAL STATEMENTS—ASSETS—DISTRIBUTION.** In an action to dissolve a partnership, such gross and wilful misconduct on the part of the defendant is shown as to warrant a distribution of all the assets to the plaintiff, where it appears that the parties entered into a partnership in the butchering business, the defendant contributing an established business and the plaintiff \$5,000 in cash, which was deposited in bank; that defendant had entire control of the business and handled all the money; that he failed to keep any records or accounts as required by the articles of copartnership, and in two and one-half months the entire assets, including accounts discoverable, amounted to less than \$4,000, although he had previously been doing a profitable business, and that it was impossible to determine the actual amount of his indebtedness to the firm, and he offered no proof of any specific loss by the firm. *Id.*..... 176

PASSENGERS:

See **CARRIERS**, 1-3.

PAYMENT:

- Of city warrants out of order, wrongful diversion, see MUNICIPAL CORPORATIONS, 8, 9.
- Of ditch warrants, mandamus, see COUNTIES, 1-5.
- Extension of time for payment, discharging surety, see INDEMNITY, 3, 4.
- Of judgment, mandamus, see APPEAL AND ERROR, 5.
- Of warrants, enjoined, see INJUNCTIONS, 3, 4.

PENALTIES:

- Effect on contracts of foreign corporations, see BUILDING AND LOAN ASSOCIATIONS, 1.
- For failure to pay taxes, see TAXATION, 11.

PERSONAL INJURIES:

- See APPEAL AND ERROR, 53-55; TRIAL, 2.
- Pleading, see PLEADING, 5.
- Release procured by fraud, see RELEASE, 1.
- To employee, see MASTER AND SERVANT.
- To passenger, see CARRIERS, 1-3.
- To person on or near railroad tracks, see RAILROADS, 1.
- To traveler on highway, see MUNICIPAL CORPORATIONS, 17-23.

PETITION:

- In probate proceedings, see WILLS, 1.
- For new school districts, restricting boundaries, see SCHOOLS AND SCHOOL DISTRICTS, 5.

PHYSICIANS AND SURGEONS:

- Assignment of contract for medical treatment, see ASSIGNMENTS, 1.
- Contract to render medical treatment by one without license, see CONTRACTS, 9.
- Prosecution for practicing without license, see CRIMINAL LAW, 7, 8.
- 1. PHYSICIANS AND SURGEONS—OWNER OF MEDICAL INSTITUTE HAVING NO LICENSE—CONTRACT TO PERFORM PROFESSIONAL SERVICES—VALIDITY—CONSIDERATION. A contract made by the owner of a "medical institute" to render professional services, cure diseases, and give medical treatment, is void as against public policy and in violation of law, where such owner has no license to practice medicine, and the physician in charge had nothing to do with making the contract, and had no connection with the institute except as an employee on a salary. *Deaton v. Lawson*..... 486

PLEADING:

- Affidavit in contempt, see CONTEMPT, 2, 4.
- Answer and proof, see INDEMNITY, 4.
- COMPLAINT: see ATTACHMENT, 1, 2; EXTRADITION, 1; FRAUD, 1; LIBEL AND SLANDER, 1; filing as commencement of action, see ACTION, 2;

PLEADING—CONTINUED.

INJUNCTION, 2; filing as jurisdictional requisite, see JUDGMENT, 3; for cancellation of deeds for fraud, see VENDOR AND PURCHASER, 4; in former trial as evidence, see CRIMINAL LAW, 18; for injuries to livestock, see CARRIERS, 10; for personal injuries, see MUNICIPAL CORPORATIONS, 23; to restrain foreclosure of assessment lien, see MUNICIPAL CORPORATIONS, 15; in tax foreclosure, see TAXATION, 6, 7, 9.

Cross-complaint, dismissal without prejudice, see WATERS, 8.

Demurrer, see ATTACHMENT, 1, 2; necessity of pleading defense, see COUNTIES, 1.

Enjoining removal of boom, navigability as defense, see WATERS, 6.

In criminal prosecutions, information, variance, see CRIMINAL LAW, 1-4, 20, 21.

Judgment on pleadings, see JUDGMENT, 5.

Probate proceedings, see WILLS, 1-6.

Special assessment, change of law, supplemental petition, see MUNICIPAL CORPORATIONS, 10.

1. PLEADING — OBJECTIONS — FAILURE TO DEMUR — CONSTRUCTION. A complaint for fraud and false representations, although exceedingly meager, will be liberally construed and upheld if possible, when attacked for the first time at the trial *Walsh v. Meyer*..... 650
2. PLEADINGS—ANSWER—ADMISSIONS. Where two railroads owned tracks on a certain street and the complaint alleged that one company operated trains at a certain point on the east side of said street, an answer denying all the allegations of the complaint except that the company operated trains on said street, does not admit that it operated trains on the tracks of the other company. *Collier v. Great Northern R. Co.*..... 639
3. PLEADING—AMENDMENT. Where a demurrer to a defense has been sustained, and no amendment is offered until the trial, it is not an abuse of discretion to refuse to allow a trial amendment, when the adverse party makes a claim of surprise. *United States, Use etc. v. Aetna Indemnity Co.*..... 87
4. PLEADING AND PROOF—VARIANCE—AMENDMENTS CONSIDERED MADE. Where the entire controversy was before the court and jury, and there was no claim that appellant was misled or prejudiced, a variance between the pleading and proof going only to the amount of the recovery, is immaterial, and necessary amendments will be considered as made. *Irby v. Phillips*..... 618
5. PLEADINGS — VARIANCE — INJURY TO PASSENGER ALIGHTING FROM STREET CAR—ALLEGATION THAT CAR WAS STOPPED AND NEGLIGENTLY STARTED—PROOF OF DEFECT IN BRAKES PREVENTING STOPPING OF CAR—ADMISSIBILITY. There is a fatal variance between allegations of a complaint that the plaintiff, a passenger, was injured by the negligent starting of a street car without warning, after it had stopped

PLEADING—CONTINUED.

for the purpose of permitting her to alight, and proof that the brakes and sand box were defective, whereby the motorman was unable to bring the car to a stop, and that plaintiff was thrown from the car before it stopped by reason of sudden jerks due to such defects; and such proof is not admissible under a general allegation to the effect that the injury was caused by the negligence of the defendant, the same being in the nature of a conclusion from the specific allegations. *Albin v. Seattle Electric Co.*..... 51

PLEAS:

Of guilty, conclusiveness, see **HABEAS CORPUS**, 1.
Of guilty, withdrawn in justice's court as evidence in superior court, see **CRIMINAL LAW**, 16.

POLICE POWER:

See **MUNICIPAL CORPORATIONS**, 24, 25.

POLICY:

Of insurance, see **INSURANCE**.

POSSESSION:

See **FORCIBLE ENTRY AND DETAINER**, 1.
Character of to establish title, see **ADVERSE POSSESSION**, 1.
Of mortgaged property, see **MORTGAGES**, 5.

PRACTICE:

See **APPEAL AND ERROR**; **APPEARANCE**; **ATTACHMENT**; **BAIL**; **CERTIORARI**, 1; **CONTEMPT**; **COSTS**; **CRIMINAL LAW**; **DIVORCE**, 1-4; **EJECTMENT**; **EVIDENCE**; **EXTRADITION**; **HABEAS CORPUS**; **INJUNCTION**; **JUDGMENT**; **JURY**; **LIMITATION OF ACTIONS**; **MANDAMUS**; **NEW TRIAL**; **PLEADING**; **PROHIBITION**; **PROCESS**; **TRIAL**; **VENUE**.
Condemnation proceedings, see **EMINENT DOMAIN**, 1, 2.
Contest of will, see **WILLS**, 1-6.
Foreclosure of lien, see **MECHANICS' LIENS**, 1-4.
In bankruptcy, see **BANKRUPTCY**, 1.
Injunctions, see **MUNICIPAL CORPORATIONS**, 2, 3.
Expulsion of member from mutual benefit society, see **BENEFICIAL ASSOCIATIONS**, 1, 2.

PREFERENCES:

To construct boom within located territory, see **LOGS AND LOGGING**, 1.

PREJUDICE:

Dismissal without, see **WATERS**, 8.
Evidence as to previous charges in criminal prosecution, see **CRIMINAL LAW**, 12, 13.
Ground for change of venue, see **CRIMINAL LAW**, 32, 33.
Prejudicial questions as to accident insurance, see **TRIAL**, 2.

PRESENTATION:

Of claim for personal injuries, excuse for delay, see **MUNICIPAL CORPORATIONS**, 20, 21.

PRESUMPTIONS:

Of negligence, see **CARRIERS**, 1-3.

As to regularity, see **JUDGMENT**, 4.

In favor of written contract, see **CONTRACTS**, 4.

As to application and intent of constitutional disclaimer, see **PUBLIC LANDS**, 4.

PRINCIPAL AND AGENT:

See **FACTORS**; **HIGHWAYS**, 1, 2; **INDEMNITY**.

Agency of partner for firm, see **PARTNERSHIP**, 1.

Effect of promise to pay, see **BANKS AND BANKING**, 2.

Proof of agency by declarations of agent, see **EVIDENCE**, 2.

Agent's oral statements as part of written contract of principal, see **CONTRACTS**, 4.

1. **PRINCIPAL AND AGENT—SOLICITORS—AUTHORITY—STATEMENTS PRELIMINARY TO EXECUTION OF WRITTEN CONTRACT BY OFFICER OF COMPANY.** An agent employed merely to solicit prospectors to engage in the service of the principal, has no authority to make or modify a contract of service for the principal. *Nielsen v. Northeastern Siberian Co.*..... 194

PRIVILEGE:

Of person in contempt from giving evidence, see **CONTEMPT**, 5.

PROBATE:

Of will, see **WILLS**, 1-6.

PROCESS:

Probate proceedings, see **WILLS**, 4.

In tax foreclosure cases, summons, see **TAXATION**, 4.

Service, order quashing reviewable, see **APPEAL AND ERROR**, 7, 8.

Issuance of injunction before service of summons, difficulty as excuse, see **INJUNCTION**, 2, 4.

1. **PROCESS—SUMMONS—PERSONAL SERVICE—BY MAIL—VALIDITY.** Bal. Code, § 4893, inferentially forbids service of summons by mail, and a service upon the statutory agent of a foreign corporation by mail is insufficient. *Bennett v. Supreme Tent etc. Maccabees*..... 431
2. **SAME—FOREIGN INSURANCE COMPANY—SERVICE UPON—INSURANCE COMMISSIONER STATUTORY AGENT—POWER TO ADMIT SERVICE.** Under Laws 1901, p. 360, requiring foreign benefit insurance associations to appoint the state insurance commissioner its attorney in fact, upon whom service of process may be made with the same legal effect as if made upon the association, such an appointment does not authorize the commissioner to admit or waive service, where no legal service has in fact been made. *Id.*..... 431

PROCESS—CONTINUED.

3. **SAME—DEPUTY INSURANCE COMMISSIONER—SERVICE UPON—VALIDITY.** An appointment of the insurance commissioner and his successors in office as the statutory agent of a foreign corporation for the purpose of service of process, pursuant to Laws 1901, p. 360, does not authorize the deputy insurance commissioner to receive service, as the power is derived from the appointment and does not pertain to the office. *Id.*..... 431
4. **SAME—INVALID SERVICE—ACTUAL NOTICE OF ACTION—SUFFICIENCY** A court cannot acquire jurisdiction of the person of a defendant who was not served with process, and made no appearance, by reason of his having actual knowledge of the suit. *Id.*..... 431

PROHIBITION:

1. **PROHIBITION—WHEN LIES—PREVENTING FURTHER PROCEEDINGS AFTER DENIAL OF APPLICATION FOR CHANGE OF VENUE—ADEQUACY OF REMEDY BY APPEAL.** Prohibition does not lie to prevent the superior court from proceeding to try a case, although it may be without jurisdiction by reason of the erroneous denial of an application for a change of venue; since there is an adequate remedy by appeal, which is the test to be applied upon all applications for extraordinary writs; and the delay or expense incident to an appeal does not affect the adequacy of the remedy. *State ex rel. Miller v. Superior Court.*..... 555

PROMISSORY NOTES:

See **BILLS AND NOTES.**

PROOF:

Variance, see **PLEADING**, 4, 5.
 Robbery, information, variance, see **CRIMINAL LAW**, 20, 21.
 Of loss insured against, see **INSURANCE**, 2.
 Of will upon retrial of contest, see **WILLS**, 6.

PROPERTY:

Community property, see **HUSBAND AND WIFE**, 1-3.
 School funds, investment, see **SCHOOLS AND SCHOOL DISTRICTS**, 1, 2.

PROXIMATE CAUSE:

Origin of fire, see **RAILROADS**, 4.

PUBLICATION:

Of summons, see **TAXATION**, 4.

PUBLIC IMPROVEMENTS:

By municipalities, see **MUNICIPAL CORPORATIONS**, 8-16.

PUBLIC LANDS:

Littoral rights of patentee as affected by state constitution, see
WATERS, 3.

1. **PUBLIC LANDS—LANDS BELOW HIGH TIDE—GRANTS—VALIDITY—POWER OF CONGRESS.** The United States had the power to grant to a railroad corporation, for some purposes at least, lands below high water mark of tide waters of the territory of Washington; and such a grant, not being void, should be upheld when no facts are shown to render it voidable. *Kneeland v. Korter*..... 359
2. **SAME—CONSTITUTIONAL DISCLAIMER—APPLICATION TO SUBSEQUENT PATENT—CONSTRUCTION.** The constitutional disclaimer of the state in and to all tide lands patented by the United States, applies to lands below high water mark and within the meander line of the government surveys of land granted by the United States to a railroad corporation prior to the admission of the state into the Union, although the patent therefor did not issue until thereafter, where the railroad company had, by the filing of its map of definite location, and completing its road, become entitled to the patent prior to the adoption of the constitution (MOUNT, C. J., RUDKIN and FULLERTON, JJ., dissenting). *Id.*..... 359
3. **SAME—OFFICIAL SURVEYS—COLLATERAL ATTACK.** The official surveys of the government are not open to collateral attack in an action at law between private parties, and the patent must be held to be made with reference to such surveys. *Id.*..... 359
4. **SAME—PRESUMPTION—SURVEYS—MISTAKE AS TO MEANDERS.** Where the meander line of the government survey was run years before the adoption of the constitution, and included tide lands below high water mark, it must be presumed that the constitutional disclaimer of title to tide lands patented by the government, had reference to the meander lines run, as establishing the line of high water mark, and not that the tide lands were included within the patent by mistake (MOUNT, C. J., RUDKIN, and FULLERTON, JJ., dissenting). *Id.*..... 359

PUBLIC POLICY:

See CONTRACTS, 9.

Agreement, by one without license, to render medical services, see
PHYSICIANS AND SURGEONS, 1.

PUBLIC SCHOOLS:

See SCHOOLS AND SCHOOL DISTRICTS.

PUBLIC USE:

Booms, see LOGS AND LOGGING, 1-5.

PUBLIC WORKS:

Bonds, see INDEMNITY, 1, 2.

PUNISHMENT:

For contempt, see CONTEMPT, 6.
Violation of injunction, see INJUNCTION, 1.

PURCHASERS:

Bona fide when, see DEEDS, 1, 2.
At void tax foreclosure sale, see TAXATION, 3.

QUESTIONS FOR COURT:

See CONTRACTS, 5.

QUESTIONS FOR JURY:

See CARRIERS, 3; MASTER AND SERVANT, 2, 4, 8, 10.

QUIETING TITLE:

See APPEAL AND ERROR, 12.

RAILROADS:

See PLEADING, 2.
As employers, negligence, see MASTER AND SERVANT, 1, 2, 8.
Grants of tide land in aid of, see PUBLIC LANDS, 1-4.
Care of tracks, see APPEAL AND ERROR, 45.
Appropriation of property of another railroad, see EMINENT DOMAIN, 1, 2.

1. RAILROADS—NEGLIGENCE—DEFECTIVE TRACKS—OWNERSHIP—OTHER RAILROAD. Where two railroad companies own parallel tracks along a city street, each making occasional use of the tracks of the other for the purpose of switching cars, the duty to keep the tracks in safe condition for public travel devolves upon the party having dominion and control over them; and one company is not liable while thus using the tracks of the other for the results of a collision with a wagon, not due to want of care on its part, but to the defective condition of the tracks of the other company. *Collier v. Great Northern R. Co.*..... 639
2. NEGLIGENCE—FIRES—DAMAGES FROM FIRES STARTED BY LOCOMOTIVE—ORIGIN OF FIRE—EVIDENCE—SUFFICIENCY. In an action for damages against a railroad company by reason of a fire, there is sufficient evidence to warrant the finding of the jury that the fire originated from the defendant's locomotives, where it appears with reasonable certainty that such a fire started some four days before on the west side of the track and was traced to the plaintiff's property, notwithstanding the evidence tended to show the existence of a number of other fires in the vicinity. *Wick v. Tacoma Eastern R. Co.*..... 408
3. SAME—INTERVENING CAUSES AS DEFENSE—WIND—VERDICT—CONCLUSIVENESS. A railroad company cannot claim exemption, by reason of intervening causes, from liability for a fire originating from its locomotives, where the issue is determined against them by the jury, upon proper instructions. *Id.*..... 408

RAILROADS—CONTINUED.

4. **SAME—INSTRUCTIONS—REVIEW.** In an action against a railroad company for damages for a fire originating from its locomotives, it is not prejudicial error to instruct the jury as to the duty of the company to exercise reasonable care to arrest the spread of fires so originating, "or which have been otherwise set upon its right of way," where the jury are further instructed that they could not find for the plaintiff unless the fire originated from the defendant and that the defendant was guilty of negligence which proximately started the fire or permitted it to spread. *Id.*..... 408
5. **SAME—TITLE TO PROPERTY DESTROYED—INSTRUCTIONS—VERDICT.** In an action against a railroad company to recover for wood destroyed by a fire which originated from the defendant's locomotives, error cannot be claimed in that the title to a portion of the wood was not in the plaintiff at the time of the fire, when the jury were instructed that the plaintiff could not recover for wood cut by a third person, if the title thereto did not pass to the plaintiff until it had been measured up, unless it had been measured at the time of the fire. *Id.*.. 408

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- Of acts of factor, see **FACTORS**, 1.
- Of invalid contract, see **MUNICIPAL CORPORATIONS**, 4, 6.
- Of franchise granted without authority, see **COUNTIES**, 9.

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- See **EJECTMENT**, 1, 2; **FORCIBLE ENTRY AND DETAINER**, 1.

REAL PROPERTY:

- Liability of community realty on husband's obligation for benefit of community personalty, see **HUSBAND AND WIFE**, 3.

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- Of corporations in general, see **CORPORATIONS**, 2-7.
- Filing of claim as bar to other remedies, see **BANKS AND BANKING**, 2.
- Temporary, order, review, see **APPEAL AND ERROR**, 26, 27.
- Order in receivership as res judicata, see **JUDGMENT**, 13.

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- See **DEEDS**, 1, 2.
- As evidence, see **CRIMINAL LAW**, 7, 8, 16-18; **EVIDENCE**, 1.
- On appeal, see **APPEAL AND ERROR**; **CRIMINAL LAW**, 29, 30.
- Estoppel by record, see **ESTOPPEL**, 2.
- Of partnership accounts, see **PARTNERSHIP**, 3, 4.
- Pleading in tax foreclosure, see **TAXATION**, 9.
- Waiver of want of jurisdiction, see **HABEAS CORPUS**, 1.
- As notice of payment of warrants out of order, see **LIMITATION OF ACTIONS**, 1.
- Clearing records as ground for vacating judgment, see **JUDGMENT**, 9.

REDEMPTION:

From mortgage, see MORTGAGES, 5.

REFORMATION OF INSTRUMENTS:

Of absolute deed, see MORTGAGES, 5.

1. REFORMATION OF INSTRUMENTS—DEED—DIVISION LINE—MISTAKE—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. An order to reform a deed on the ground of mistake and misrepresentations of the vendors as to the boundary line, the proof must be clear and convincing, and is not sufficient, where three witnesses testify for the plaintiffs to the effect that the fractional part of the lots described in the deed was represented as coming to the line of a certain sidewalk, when in fact it fell two feet and nine inches short thereof, and four witnesses for the defendants contradicted the plaintiffs' evidence, and they were corroborated by the fact that the lines were known and marked, that the defendants could not have been mistaken and had no object in making such representations, as it was against their interests to do so, and would leave them a narrow strip of useless land upon the other side of the parcel conveyed. *Heffron v. Fogel*..... 698

REFORMATORIES:

Conviction and sentence of youthful offenders, see CRIMINAL LAW, 23, 24.

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Of member in beneficial association, see BENEFICIAL ASSOCIATIONS, 1, 2.

RELEASE:

Of surety, see INDEMNITY, 3, 4.

1. RELEASE AND DISCHARGE—PROCURED BY FRAUD—VERDICT—REVIEW. The release of a claim for personal injuries secured by fraud is no defense to an action for damages, and the appellate court will not weigh conflicting evidence as to such release where there was sufficient testimony of fraud, if uncontradicted, to sustain the verdict. *Westby v. Washington Brick etc. Co*..... 289

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As to condition of property, see INSURANCE, 1.

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- Of contract against public policy, see **CONTRACTS**, 9.
- Of contract of sale, see **SALES**, 1-6.
- Of contract for sale of land, see **VENDOR AND PURCHASER**, 1-4.
- Of sale by attorney to client, see **ATTORNEY AND CLIENT**, 1.

RESERVATION:

- In deeds, see **DEEDS**, 1, 2.
- Military, crimes upon, see **HABEAS CORPUS**, 1.

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- See **CARRIERS**, 1, 3.

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- Ruling on motion to dismiss appeal, see **APPEAL AND ERROR**, 42, 43.

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- See **MUNICIPAL CORPORATIONS**, 24, 25; **STATUTES**, 1.

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- Of boom locations for nonuser, see **LOGS AND LOGGING**, 2, 4.

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- See **APPEAL AND ERROR**; **CERTIORARI**; **CRIMINAL LAW**, 8, 12-14, 19-21, 27-33.
- Of engineer's estimates, see **CONTRACTS**, 6.
- Of tax foreclosure, parties, see **TAXATION**, 8.
- Writ of, costs, see **COSTS**, 1, 2.
- Apportionment of local improvement tax, see **CONSTITUTIONAL LAW**, 1.

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- See **WATERS**, 1-3.

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- Assumed by employee, see **MASTER AND SERVANT**, 8-11.

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- See **HIGHWAYS**.

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- See **CRIMINAL LAW**, 3, 20, 21.

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- See **CONTRACTS**, 3.
- Of bill of exchange or promissory note, see **BILLS AND NOTES**, 1-4.
- Of county property, see **COUNTIES**, 6, 7.
- Of goods in bulk, see **FRAUDULENT CONVEYANCES**, 1-3.
- Of realty, see **VENDOR AND PURCHASER**.
- Of vessel, appurtenances, see **SHIPPING**, 1.
- Under execution, see **JUDGMENTS**, 1, 2.

SALES—CONTINUED.

Under foreclosure, vacation, see MORTGAGES, 1-4.

Pretended sale of private bank, see FRAUD, 1.

Transactions between attorney and client, see ATTORNEY AND CLIENT, 1.

1. SALES—FRAUD—RESCISSION BY VENDEE—DUTY TO INVESTIGATE—INSTRUCTIONS. In an action for damages by reason of fraud in the sale of a rooming house and fixtures, and false representations as to the reputation of the house and its tenants and the profits of the business, instructions are erroneous where they do not cast upon the plaintiff the burden of such investigation as the opportunity furnished. *Walsh v. Meyer*..... 650
2. SALES—WARRANTY—MEASURE OF DAMAGES. The measure of damages for breach of warranty as to the character of a rooming house sold to the plaintiff, is the difference between the value of the property and what it would have been if as represented to be. *Id.*.... 650
3. SAME—DAMAGES—FRAUD—MENTAL AGONY. In an action for damages for false representations as to the reputation of a rooming house sold to the mother of two young girls, damages for humiliation and mental agony due to the ill repute of the house and its inmates cannot be recovered. *Id.*..... 650
4. SALES — RESCISSION — FRAUD — TRANSACTIONS BETWEEN ATTORNEY AND CLIENT. A sale of mining stock by an attorney to his client, an old lady inexperienced in business matters, for whom he had been transacting business, should be cancelled for fraud, where the client testified that he represented it as a sale by the company, in which he had no interest, and that a monthly dividend equal to ten per cent per annum would be paid thereon, while the fact was that he sold her his own stock at one dollar per share, when its highest selling price was fifty cents per share, and advanced the monthly dividend himself, the company never having paid any dividends, and where her testimony is strongly corroborated by a letter written by the attorney describing the transaction as testified to by her. *Landis v. Wintermute*..... 673
5. SAME—LACHES—WAIVER OF RESCISSION. In such a case the client is not estopped by neglecting to rescind the sale upon being informed that the stock sold for fifty cents a share, when she thereupon asked the attorney to show her his stock, and her suspicions were allayed by seeing printed thereon the words "shares \$1 each," and by other matters. *Id.*..... 673
6. SAME — ESTOPPEL — VOTING STOCK AFTER ATTEMPTED RESCISSION. A person to whom mining stock has been fraudulently sold, and who has sought a rescission of the sale, tendering back the stock, is not estopped to insist upon a rescission by the fact that she attended a stockholders meeting and voted the stock after the commencement of the action. *Id.*..... 673

SATISFACTION:

Of mortgage, see MORTGAGES, 5.

SCHOOLS AND SCHOOL DISTRICTS:

Disturbing school, see CRIMINAL LAW, 5, 6, 23, 24, 29; JURY, 1.

Review of establishment of school district, see CERTIORARI, 1.

1. SCHOOLS—PERMANENT SCHOOL FUND—INVESTMENT—PROPRIETY OR SAFETY — DETERMINATION OF STATE LAND COMMISSIONERS. The determination of the board of state land commissioners as to the propriety and safety in investing the permanent school fund is conclusive on the state auditor and on the courts, when not impeached for bad faith or fraud. *State ex rel. Port Townsend v. Clausen*... 95
2. STATES — FINANCIAL MANAGEMENT — INVESTMENT OF PERMANENT SCHOOL FUND—MUNICIPAL BONDS—DEFINITION. Bonds issued by a city under Laws 1901, p. 177, to defray the cost of the construction of waterworks, which are payable only out of a special fund derived from the revenues of the waterworks system, and for which the city is not in any way liable, are not municipal bonds within the meaning of Const., art. 16, § 5, authorizing the investment of the permanent school fund in municipal bonds, as such provision contemplates the protection of the permanent school fund by investment in bonds secured by a pledge of the credit of the municipality. *State ex rel. Port Townsend v. Clausen*..... 95
3. SCHOOLS AND SCHOOL DISTRICTS — ESTABLISHMENT OF NEW DISTRICT—SCHOOL SUPERINTENDENT—POWERS. New school districts may be formed by the school superintendent, containing less than four sections of land, under 3 Bal. Code, § 2277 (Laws 1901, p. 371, § 2), if the district can support six months school per year, and this question is one for the determination of the superintendent. *Wilsey v. Cornwall*..... 250
4. SAME—APPEAL TO COUNTY COMMISSIONERS. Where, upon appeal to the county commissioners, the decision of the school superintendent that a district can support six months school, is affirmed, the decision is final. *Id.*..... 250
5. SAME—BOUNDARIES OF NEW DISTRICT—FIXED BY SUPERINTENDENT. The school superintendent has power, upon application, to form a new school district and fix its boundaries, and in so doing is not restricted to the territory specified in the petition. *Id.*..... 250

SECRETARY OF STATE:

Mandamus to compel filing of illegal articles of incorporation, see MANDAMUS, 2.

SENTENCE:

Of youthful offender in criminal prosecutions, see CRIMINAL LAW, 23, 24.

SERVICE:

Of process, see **PROCESS**, 1-4; failure, excuse, see **INJUNCTION**, 4.

SETTLEMENT:

See **COMPROMISE AND SETTLEMENT**, 1.

Of claim for personal injuries, see **RELEASE**, 1.

Of statement of facts, see **APPEAL AND ERROR**, 30.

SHIPPING:

Accident to seaman, see **MASTER AND SERVANT**, 4, 7.

1. **SHIPPING—SALE OF VESSEL—APPURTENANCES—WHAT ARE.** A crank shaft which had been replaced by a new one, and a new duplicate unattached rudder on a boat, do not pass under a bill of sale as "appurtenances" or "necessaries," where the vendor had another boat on which they could be used, the vendee did not know of the rudder, and they were not really necessary for the business in which the boat was engaged; since it fairly appears that they were not in the contemplation of the parties, and nothing is considered an appurtenance unless requisite to the use of the boat. *Gazzam v. Moe*..... 593

SIDEWALKS:

See **MUNICIPAL CORPORATIONS**, 7-9.

SLANDER:

See **LIBEL AND SLANDER**.

SPECIFIC PERFORMANCE:

1. **SPECIFIC PERFORMANCE—INJUNCTION—CONTRACTS—ELECTRIC POWER FOR RAILROAD—PUBLIC INTEREST—EVIDENCE.** In an action for an injunction to compel a power company to perform its contract to furnish power to a street railroad company, the evidence sufficiently shows the necessity where it appears that the facilities of the street railroad company for generating power were not sufficient to create any reserve force, which is necessary to furnish power for continuous use. *Seattle Electric Co. v. Snoqualmie Falls Power Co*..... 380
2. **SAME — CONTRACTS — VIOLATING FRANCHISES — ENFORCEMENT.** A court of equity will compel the performance of a contract of a power company to furnish power to a street railroad company, for a reasonable time to enable the company to obtain a supply from other sources, where the public interests are involved and require it, notwithstanding the contract was not enforceable between the parties owing to a clause therein violating the franchise of the power company. *Id*..... 380

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Of case or facts for purpose of review, see **APPEAL AND ERROR**, 13-17, 19, 24-34; **CRIMINAL LAW**, 29, 30.

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- Interstate extradition, see EXTRADITION, 1.
- Investment of permanent school fund, see SCHOOLS AND SCHOOL DISTRICTS, 1, 2.
- Liability for costs in criminal prosecutions, see COSTS, 3.
- Mandamus to secretary of state, see MANDAMUS, 2.
- Constitutional disclaimer of title to patented tide lands, see PUBLIC LANDS, 2, 4.

STATUTES:

- See AGRICULTURE, 2; APPEAL AND ERROR, 19, 24, 30, 45, 61; ATTACHMENT, 1, 2; CONTEMPT, 4; CORPORATIONS; COSTS, 1, 2, 3; COUNTIES, 7, 8; CRIMINAL LAW, 2-7, 24; EXTRADITION, 1; HUSBAND AND WIFE, 2; LIBEL AND SLANDER, 4; LOGS AND LOGGING, 4; MECHANICS' LIENS; NEW TRIAL, 1; TAXATION; WATERS; WILLS, 4.
 - Bond on public work, see INDEMNITY, 1, 2.
 - Bulk stock laws, see FRAUDULENT CONVEYANCES, 1-3.
 - Change of venue, see VENUE, 1.
 - City charter, see MUNICIPAL CORPORATIONS, 4-7.
 - Commencement of action, see INJUNCTION, 2.
 - Constitutional disclaimer, see PUBLIC LANDS, 1-4; damages for unlawfully cutting timber, see ACTION, 1.
 - Establishment of new school districts, see SCHOOLS AND SCHOOL DISTRICTS, 3.
 - Fire escapes, retroactive effect, see MUNICIPAL CORPORATIONS, 24, 25.
 - Investment of school fund, see SCHOOLS AND SCHOOL DISTRICTS, 2.
 - Municipal assessments, see MUNICIPAL CORPORATIONS, 9, 10, 14.
 - Negotiable instrument law, construction, see BILLS AND NOTES, 3, 4.
 - Noncompliance by foreign corporations, effect, see BUILDING AND LOAN ASSOCIATIONS, 1.
 - Of limitation, see LIMITATION OF ACTIONS.
 - Service of process, see PROCESS, 1-3.
 - Violation by carrier, damages, contract of exemption, pleading, see CARRIERS, 4, 5, 10.
1. STATUTES—AMENDMENT. Where a general law is by reference made applicable to a later act, the subsequent amendment of the general law will not be applicable to the later act. *Dexter v. Olsen*..... 199
 2. STATUTES—AMENDMENT—SETTING FORTH IN FULL. Const., art. 2, § 37, does not require, upon the amendment of a statute, that the entire act as amended shall be set forth in full, but only the amended sections. *State v. Lawson*..... 455

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- Delivery of certificate of stock in escrow, see ESCROWS, 1.

STOCKHOLDERS:

- Of corporations, see CORPORATIONS, 2-7.

STREET RAILROADS:

- Carriage of passengers, see CARRIERS.
- Compelling performance of contract to supply power to, see SPECIFIC PERFORMANCE, 1, 2.
- Pleadings for personal injury, see PLEADING, 5.

STREETS:

- Improvements, assessments, wrongful diversion, liens, see MUNICIPAL CORPORATIONS, 8-16.
- Injuries from defects in, see MUNICIPAL CORPORATIONS, 17-19.
- Local improvements, apportionment of tax, see CONSTITUTIONAL LAW, 1.
- Railway tracks, maintenance in safe condition, see RAILROADS, 1.
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- By commission merchant of successor, see FACTOR, 1.
- Of executor in action to vacate divorce, see DIVORCE, 3, 4.

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- See ACTION.

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- See PROCESS.
- In tax foreclosure, see TAXATION, 4.
- Order quashing service reviewable, see APPEAL AND ERROR, 7.
- Temporary injunction prior to service, see INJUNCTION, 2.

SUPERSEDEAS:

- On appeal, see APPEAL AND ERROR, 20-22, 34.
- Mandamus to compel fixing, see MANDAMUS, 1.

SUPERVISORS:

- Fraudulent issuance of road tax certificate, see HIGHWAYS, 1, 2.

SURETYSHIP:

- Liability of community realty on husband's obligation, see HUSBAND AND WIFE, 3.

SURPRISE:

- See PLEADING, 3.
- Ground for new trial, see NEW TRIAL, 3.

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- Validity of government surveys as against collateral attack, see PUBLIC LANDS, 3, 4.

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- Of entire judgment by appeal from part, see JUDGMENT, 2.

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Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 8-16.

Tax lien foreclosure, see JUDGMENT, 12.

Road tax, refund certificate, fraud, see HIGHWAYS, 1, 2; LIMITATION OF ACTIONS, 3.

1. **TAXES—HIGHWAYS—REFUND CERTIFICATES—ACTIONS.** An action by a county to recover a refund upon a road tax is an action for money paid and not one to recover taxes. *Walla Walla County v. Oregon R. & Nav. Co.*..... 398
2. **SAME—DEFENSE—VALIDITY OF TAX.** One who voluntarily pays a tax cannot raise objections as to its validity. *Id.*..... 398
3. **TAXES—PAYMENT OF ONE IN POSSESSION UNDER VOID FORECLOSURE SALE—EQUITABLE LIEN FOR.** The purchaser at a void foreclosure sale, who takes possession in good faith, and pays the taxes, is entitled to a lien upon the premises for the amount of the taxes paid. *Dalgardno v. Barthrop.*..... 191
4. **TAXATION — FORECLOSURE OF LIENS — SERVICE BY PUBLICATION — NOTICE TO OWNERS—OWNERS DESCRIBED IN CERTIFICATE.** In an action of ejectment by the purchaser of lands sold on a foreclosure of an individual delinquency tax certificate, an answer of the owners claiming by adverse possession fails to state any valid ground for attack on the foreclosure judgment by alleging the fact that they were resident owners, well known to the plaintiff, and were not served with notice; since the summons and notice need only be given to the owner described in the certificate; and since the proceeding is *in rem*, and it is competent for the legislature to provide for foreclosure without service other than by publication. *Rowland v. Eskeland.*..... 253
5. **SAME — FORECLOSURE JUDGMENT — CONCLUSIVENESS — COLLATERAL ATTACK.** A tax foreclosure judgment is conclusive as to all defenses specified in Bal. Code, § 1767, as to parties not contesting the same, who are thereby estopped to collaterally attack the judgment on the ground specified. *Id.*..... 253
6. **SAME—ANSWER—TENDER OF TAX PREREQUISITE TO DEFENSE.** In an action by a purchaser to recover the possession of lands sold for taxes, it is a prerequisite to a defense that the defendants shall allege and prove a tender of the taxes for which the land was sold. *Id.*..... 253
7. **TAXATION—FORECLOSURE OF TAX LIEN—PLEADING—OWNERSHIP AND INTEREST—COMPLAINT—SUFFICIENCY.** The allegation, in a complaint to foreclose a tax lien, that certain of the defendants were the owners of the property in fee simple, is not open to the objection by the other defendants that they are thereby shown not to have any interest in the property. *Port Townsend v. Trumbull.*..... 386

TAXATION—CONTINUED.

8. **SAME—APPEAL—INTEREST OF DEFENDANTS—RIGHT TO REVIEW.** The defendants in a tax lien foreclosure, in order to object to the judgment upon appeal, must show that they are interested in the property. *Id.*..... 386
9. **SAME—MATTERS OF PUBLIC RECORD—COMPLAINT—SUFFICIENCY.** In an action to foreclose a tax lien, a motion to make the complaint more definite and certain by setting forth the proceedings, which are all matters of record, is properly denied. *Id.*..... 386
10. **SAME—LIMITATION OF ACTIONS—SPECIAL CHARTER PROVISIONS—CONSTRUCTION.** Under the charter of the city of Port Townsend, providing that taxes levied thereunder shall have the effect of a judgment lien which should not be satisfied or removed until paid, the general statute of limitations for the commencement of actions does not apply to an action brought to foreclose the city's tax lien. *Id.*... 386
11. **SAME—JUDGMENT—EXCESSIVE.** A judgment foreclosing a tax lien is excessive where it exceeds the tax, penalty, and legal interest. *Id.*..... 386

TENDER:

See MUNICIPAL CORPORATIONS, 15.
Of tax, see TAXATION, 6.

TESTAMENT:

See WILLS.

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See PUBLIC LANDS, 1-4.

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As essence of contract for sale of realty, see VENDOR AND PURCHASER, 1.
For filing contest of will, see WILLS, 1, 2.
For taking appeal, statement of facts, see APPEAL AND ERROR, 18, 19.

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See EJECTMENT, 1, 2.
Of city to street, estoppel to deny, see ESTOPPEL, 2.
To property destroyed by fire, instructions, see RAILROADS, 5.
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See LIBEL AND SLANDER.
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See **CRIMINAL LAW**, 22-25; **DIVORCE**, 1-4; **ESCROWS**; **FORCIBLE ENTRY AND DETAINER**, 1; **LIBEL AND SLANDER**; **NEW TRIAL**.

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For breach of contract in general, see **CONTRACTS**.

Breach of warranty, see **SALES**, 1-3.

Cross-examination, see **CRIMINAL LAW**, 11.

For enforcement of trust, see **TRUSTS**, 1.

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Evidence of previous prosecutions, see **CRIMINAL LAW**, 12, 13.

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Instructions in civil actions: As to, contributory negligence, see **APPEAL AND ERROR**, 54; defective street, see **MUNICIPAL CORPORATIONS**, 19; fires started by railroads, see **RAILROADS**, 4; inspection by vendee, see **SALES**, 1; mental suffering, see **LIBEL AND SLANDER**, 3; negligence, see **APPEAL AND ERROR**, 53; not excepted to as law of case, see **APPEAL AND ERROR**, 58; review on appeal, see **APPEAL AND ERROR**, 54; wood destroyed by fire, see **RAILROADS**, 5.

Instructions in criminal prosecutions, see **CRIMINAL LAW**, 14, 19, 26, 27.

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Mandamus to compel court to proceed with trial, see **MANDAMUS**, 3.

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For personal injuries, see **CARRIERS**, 1-3; **MUNICIPAL CORPORATIONS**, 17-23.

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Suits to set aside fraudulent conveyances, see **FRAUDULENT CONVEYANCES**.

Theory in lower court basis for review on appeal, see **APPEAL AND ERROR**, 44.

To redeem from mortgage, see **MORTGAGES**, 5.

Vacation of foreclosure, see **MORTGAGES**, 1-4.

1. **TRIAL—SPECIAL INTERROGATORIES—NO EVIDENCE TO SUSTAIN ANSWERS—ESTOPPEL—CHALLENGE TO SUFFICIENCY OF EVIDENCE—WHEN NOT WAIVED.** Requesting the submission of special interrogatories does not make the answers binding, where there was no evidence to sustain the findings, and the defendant had challenged the sufficiency of the evidence by motions for nonsuit and for a directed verdict for insufficiency of the evidence. *Larson v. American Bridge Co.*.... 224
2. **TRIAL—FACT THAT DEFENDANT CARRIES ACCIDENT INSURANCE—MISCONDUCT OF COUNSEL.** It is prejudicial error in a personal injury case for the plaintiff's counsel to continually ask questions with the evident intent to get before the jury the fact that the defendant carries accident insurance, and it is immaterial that the questions were asked for the purpose of impeaching the testimony of a witness. *Westby v. Washington Brick etc. Co.*..... 289

TROVER AND CONVERSION:

1. **CONVERSION—ACTION AGAINST SHERIFF—TITLE TO PROPERTY—CONTRACT—WHEN NOT CONDITIONAL SALE—NOTICE TO CREDITORS.** In an action for the conversion of sawlogs levied upon by a sheriff, in which the plaintiff claimed absolute ownership through a written contract from the judgment debtor, the fact that the contract was not filed as a chattel mortgage or as a conditional bill of sale, and was therefore void as to creditors, is immaterial, when the court finds, upon competent evidence, that the plaintiff was the absolute owner of the property, and the creditors became such after the execution of the contract and with notice thereof. *Montesano Nat. Bank v. Graham*..... 490

TRUSTS:

Property held by wife for son, see **HUSBAND AND WIFE**, 1.

Trust company, incorporation, name, see **CORPORATIONS**, 1.

1. **TRUSTS—CONTRACTS—CONSTRUCTION.** A written agreement by a grantee to account for the "net profits" of the real estate conveyed to his brothers and sisters, upon a "future distribution of heirship," will be held to mean the entire proceeds, and not the proceeds less the expense of the grantee's education in Europe, as claimed by him, where there was evidence to sustain a verdict to the effect that such was the intent of the parties. *Rohrer v. Rohrer*..... 259

ULTRA VIRES:

Ratification of franchise granted without authority, see **COUNTIES**, 9.

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See **JUDGMENT**, 2, 4-12.

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For grounds considered upon denial of new trial, see **NEW TRIAL**, 2.

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Of street, petition as recognition of city's rights, see **ESTOPPEL**, 2.

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VARIANCE:

Between pleading and proof, in civil action, see **PLEADING**, 4, 5; in criminal prosecutions, see **CRIMINAL LAW**, 20, 21.

VENDOR AND PURCHASER:

Purchasers at tax sale, see **TAXATION**, 3.

1. **VENDOR AND PURCHASER—RESCISSION BY VENDEE—GROUNDS FOR—FAILURE OF TITLE—BARGAIN FOR IMMEDIATE POSSESSION.** Where a contract for the sale of a farm called for immediate delivery of possession of the premises in the month of August, which was desired by the vendees in order to make improvements and put in fall crops, there was a failure of consideration entitling the vendees to a rescission, when it appears that the vendors had no title or right of possession, and did not acquire the same until November, after the vendees had commenced the action for a rescission. *Smith v. Glenn*..... 262
2. **VENDOR AND PURCHASER—RESCISSION OF SALE FOR FRAUD—PARTIES.** In an action for the cancellation of deeds for fraud, the party to whom the deed was made and who had conveyed to another, is a proper party defendant; nor could he complain of the joinder when no relief or costs were adjudged against him. *McMullen v. Rousseau*..... 497
3. **SAME—FALSE REPRESENTATIONS BY VENDEE—RIGHT TO RELY UPON INFORMATION NOT AT HAND.** Where a conveyance of lands at a reduced price for the sum of \$200, was secured through fraudulent representations to the effect that they were wanted for a mill site, that the defendant had three carloads of mill machinery on the way, and sufficient lumber to keep the mill running ten years, and would fur-

VENDOR AND PURCHASER—CONTINUED.

nish the grantor firewood free, and give him employment in the mill, the grantor had a right to rely on the statements and was not at fault in failing to discover the fraud, in view of the small amount involved; since the means of ascertaining the truth was not at hand.

Id...... 497

4. **SAME—FALSE REPRESENTATIONS BY THIRD PARTY—PLEADING AND PROOF.** In an action to cancel deeds for fraud, evidence of fraudulent representations made by a third party, who opened the negotiations on behalf of the defendant, which were afterwards repeated by the defendant, is admissible although not set forth in the complaint.

Id...... 497

VENUE:

Change of, in civil actions, see **APPEAL AND ERROR**, 3; **MANDAMUS**, 3; **PROHIBITION**, 1; in criminal prosecutions, see **CRIMINAL LAW**, 32, 33.

1. **VENUE—CHANGE OF—IN GARNISHMENT PROCEEDINGS—STATUTE—CONSTRUCTION.** Bal. Code, § 4857, authorizing a change of venue where an impartial trial cannot otherwise be had or where convenience and justice will be forwarded by the change, applies to garnishment proceedings; since the statute is in furtherance of justice and should be liberally construed. *State ex rel. Wyman, Partridge & Co. v. Superior Court*..... 443

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Curing error at trial, see **APPEAL AND ERROR**, 54, 55.

Fire started by locomotive, conclusiveness, see **RAILROADS**, 3.

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WARNING ORDER:

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WARRANTS:

As basis for extradition, see **EXTRADITION**, 1.

For construction of ditch, enforcing payment, see **COUNTIES**, 1-5.

Restraining payment, see **INJUNCTION**, 3.

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WARRANTY:

Breach as ground for rescission, see **SALES**, 1-3.

WATERS:

Booms, see **LOGS AND LOGGING**.

Construction of irrigating canal, see **CONTRACTS**, 6, 7.

Reservation, inconsistent descriptions, see **DEEDS**, 1, 2.

Water pipes in highway, franchise, see **COUNTIES**, 8, 9.

1. **WATERS — IRRIGATION — WRONGFUL DIVERSION — ESTOPPEL OF LITTORAL PROPRIETOR—FAILURE TO OBJECT TO OPERATIONS ON LANDS OF OTHERS.** The fact that a littoral proprietor upon the arm of a lake stood by without objection during the construction of a dam for irrigation purposes, erected at great expense, cutting off his property from the main body of the lake and draining his premises, would not amount to an estoppel preventing him from objecting to the diversion of the waters by the closing of head gates so as to leave no water on his premises, where no act was done or admission made intended to influence or encourage the construction, which was entirely upon the lands of others. *Madson v. Spokane Valley Land etc. Co.*..... 414
2. **NAVIGABLE WATERS—WHAT ARE.** A small lake of the average depth of eighteen feet, having no navigable inlet or outlet, upon which a small steamer is run for hire during the camping season, is navigable within, Const., art. 17, § 1. *Id.*..... 414
3. **SAME—TITLE BY PATENT PRIOR TO ADOPTION OF STATE CONSTITUTION—LITTORAL RIGHTS.** The vested rights of a littoral owner upon a navigable lake, under a patent issued prior to the adoption of the state constitution, to the uninterrupted use of the water in its natural flow or condition, continues unimpaired by the constitution, and cannot be divested except under the power of eminent domain upon the making of compensation; and it is immaterial whether the water flowed from, or stood upon, the land. *Id.*..... 414
4. **NUISANCE — ABATEMENT — BOOM ACROSS STREAM — EVIDENCE — ADMISSIBILITY.** In an action to enjoin the removal of a boom placed across a stream on the plaintiff's land for the purpose of preventing drift wood from injuring his premises, evidence as to the practicability of the plaintiff's plan is immaterial. *Winsor v. Hanson*.... 423

WATERS—CONTINUED.

5. **SAME—REMOVAL BY FLOOD PENDING ACTION—SUBJECT-MATTER OF CONTROVERSY.** In an action to enjoin the removal of a boom placed across a stream on the plaintiff's lands, in which the defendant files a cross-complaint for an injunction against the obstruction of the stream, the fact that the boom was carried away by high water between the commencement of the action and the time of trial does not warrant a dismissal because of cessation of the controversy; since the subject-matter of the action was not the particular boom but the right of the plaintiff to obstruct the stream. *Id.*..... 423
6. **SAME—ISSUES—NAVIGABILITY OF STREAM.** In an action to enjoin the removal by an upper proprietor of a boom placed across the stream on the plaintiff's lands, the navigability of the stream is no defense to the action, when it has not been placed in issue by the pleadings and there is no attempt to justify its removal upon that ground. *Id.*..... 423
7. **SAME—ABATEMENT BY ACT OF PARTY—JUSTIFICATION—INJUNCTION.** A proprietor is not justified in entering upon adjoining lands to abate a nuisance by the removal of a boom placed across the stream, where it has caused him no injury, and merely because of a probability that it will create a nuisance in the future; nor will injunction lie against such an obstruction where the apprehended damage by the backing up of water merely problematical. *Id.*..... 423
8. **SAME—DISMISSAL OF CROSS-COMPLAINT—WITHOUT PREJUDICE.** In an action to enjoin the removal of a boom placed across a stream, a dismissal of a cross-complaint to enjoin the obstruction as a nuisance should be without prejudice, where there is proof that no present injury had been done and injury in the future was merely problematical. *Winsor v. Hanson.*..... 423

WILLS:

Contest, see **APPEAL AND ERROR**, 6.

1. **WILLS—CONTEST—PLEADING—AMENDMENT OF PETITION—INSTITUTION WITHIN ONE YEAR.** When a will contest is filed within time, and the petition is struck out for want of verification, with express leave to amend, the court is not without jurisdiction, and the proceeding is not barred, by reason of the fact that the amended petition was not filed within one year. *In re Sullivan's Estate.*..... 202
2. **SAME—TIME FOR FILING CONTEST.** When a decree admitting a will to probate is void, the time for filing a contest is not limited to one year. *Id.*..... 202
3. **SAME—DISMISSAL FOR WANT OF PROSECUTION—PROCEEDINGS STAYED BY INJUNCTION OF FEDERAL COURT—EXCUSE FOR DELAY.** It is error to dismiss a will contest for want of prosecution, when the proceedings were restrained by the order of the Federal court, although the proceeding in such court was instituted by the contestants of the will while the matter was still pending in the state courts. *Id.*..... 202

WILLS—CONTINUED.

4. **WILLS—PROBATE—CITATION—SERVICE—TEN DAYS NOTICE—ORDER OF PROBATE—JURISDICTION.** The probate of a will is void for want of jurisdiction when no notice to the widow or next of kin was given under Bal. Code, § 4606, requiring a ten days' notice of the time set for hearing. *Id.*..... 202
5. **SAME—BURDEN OF PROOF.** Upon a contest, the burden of proof is upon the proponent of a will, although a decree had been entered admitting the will to probate, where such decree was void for want of jurisdiction. *Id.*..... 202
6. **SAME—OFFER OF PROOF OF NUNCUPATIVE WILL—TIME FOR—VOID ORDER OF PROBATE—REVERSAL—EFFECT ON PENDENCY OF PROCEEDING.** When proof of a nuncupative will was offered within six months, and a void order of probate was entered thereon, it cannot be claimed, after a reversal of the order on appeal, that the proof was not "offered" in time, and that it is now too late to offer such proof upon the retrial of the contest. *Id.*..... 202

WITNESSES:

- Exclusion at trial, see **CRIMINAL LAW**, 25.
 Absence, ground for new trial, see **NEW TRIAL**, 3.
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 Justice of the peace witness as to facts at trial before him, competency, see **CRIMINAL LAW**, 15.
 Private examination by court, see **APPEAL AND ERROR**, 56.
 Tampering with, prosecution, see **CRIMINAL LAW**, 9, 10, 17-19.
 Testimony against self in contempt, see **CONTEMPT**, 5.
1. **WITNESSES — IMPEACHMENT — GENERAL REPUTATION — LIMITED KNOWLEDGE OF IMPEACHING WITNESSES—QUESTIONS AS TO SPECIFIC CONDUCT—EXCLUSION.** A witness cannot be impeached where the acquaintance was so limited that the general reputation could not have been known, or by testimony relating only to specific conduct. *Bringgold v. Bringgold*..... 121

WORK AND LABOR:

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WRITS:

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